Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

NO. 80-190

# In the Supreme Court of the United States

October Term, 1980

HERMAN DIAMOND, Petitioner,

v.

UNITED STATES OF AMERICA AND
ET AL. Respondent,

v.

UNITED STATES OF AMERICA and

UNITED STATES ARMY CORPS OF
ENGINEERS, Savannah, Ga., Respondent,

v.

Dr. FREDRICK C. MARLAND,
State of Georgia, ET AL,
Respondent,

## PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

HERMAN DIAMOND, pro se
3610 Macceo Dr.
Savannah, Ga. 31410

## QUESTIONS PRESENTED

The questions presented are:

1. Has the Court of Appeals, Fifth Circuit, decided an important question of Federal Law in conflict with applicable State laws and Compact between the Federal Government and the State of Georgia in a way that should be settled by this Court.

   Petitioner's State and Constitutional Rights and Immunities have been violated pursuant to Articles 4,5, 6, 10, and 14 and the 1802 Compact, are in Conflict with applicable decisions of this Court, in Oregon v. Corvallis Sand and Gravel Co., 50 L.Ed. 2d 550, 97 Sct. (1977).

2. Have the Lower Courts departed from accepted and usual course of Judicial proceedings, so as to call for the exercise of this Honorable Court's Power of Supervision, where the District Court refused to recuse and denied Petitioner his right's to a fair trial without Bias and Prejudice, pursuant to 28 U.S.C.§144; and continue to hear the three cases over objections of Petitioner.

3. Has the Lower Court departed from accepted and usual course of Judicial Proceedings so as to call for this Court's Power of Supervision, when a U.S. Assistant District Attorney, Mr. Lamar Walters, of the Southern District of Georgia files his own

personal, unsworn Civil Complaint, CA 3092, without Statutory provisions of law; abused his power of office, and personally prosecute Petitioner for an assumed violation of a Federal statues; and, instigated Federal and State employees to testify without the power of subpoena to secure a fraudulent permanent injunction over Petitioner's property in violation of Articles 4,5,6,7, and 14, and without a jury, trial as guaranteed by the Article 7 of the Constitution, with intent to harm and damage Petitioner, United States v. Cohen, 38 (App.D.C. 123 (1912).

4. Has the Court of Appeals, Fifth Circuit, departed from accepted and usual course of Judicial procedure, so as to call for the exercise of this Honorable Court's Supervision.

The Court of Appeals has affirmed all three causes of action based on a vacated Judgment in U.S. v. Diamond, 512 F.2d.157, Cert. denied, 422 U.S. 928 (1975); WHEREAS, as by consolidation, a new cause of action requires a new verdict and Judgment,

WHEREAS, in Case No. CA 3092, no new Judgment was ordered, the Court of Appeals has no jurisdiction to reinstate the old judgment in all three Causes of Actions -

Mutual Life Insurance Co. v. Hillmon, 145 U.S. 709, 710 36 L. Ed.2d. (1891) [Headnote at 293, 294]

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ARTICLES OF THE CONSTITUTION


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IN THE

Supreme Court of the United States

October Term, 1980

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HERMAN DIAMOND, Petitioner

versus

No. 78-2969 - United States of America and U. S. Army Corps of Engineers, Savannah Division, ET AL,
Respondent.

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No. 79-2942 - HERMAN DIAMOND, Petitioner

versus

Dr. Fredrick Marland,Colonel Edwin Kaiser,Colonel Frank Walter,Stevan Osvold,William W.Young,Edward Myatt Glenn F. MaCauley.et al. Respondent.

PETITION ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner seeks certiorari to review a judgment of the Court of Appeals for the Fifth Circuit and in support of its petition respectfully shows:

OPINION BELOW AND JURISDICTION

The three Cases, CA 3092 - CV 475-221 and CV-477-80, being interrelated was tried before the late Honorable Judge Alexander A. Lawrence, United States District Court, Southern District of Georgia, who entered his Order, to deny all motions in CA 3092,

and CV 475--221 on August 2, 1978,also issued a Judgment for the Army Corps of Engineers on August 2, 1978. In CV-477-80, Summary Judgment was issued on July 20, 1979.

The Court of Appeals Fifth Circuit rendered its opinion in all three cases April 28, 1980; per curuim (Not to Be Published), and on rehearing by Government Petition, rearranged the wording to issue a new opinion on June 24, 1980; WHEREAS, Petitioner's motion for rehearing was denied May 23, 1980.

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Jurisdiction 28 U.S.C. 1254(1)

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STATUE'S INVOLVED

28 U.S.C. §1345, 28 U.S.C.§ 1331, 28 U.S.C. § 1343(3), 42 U.S.C. §1983, 42 U.S.C. §1985(3), 33 U.S.C. §403; 407

STATEMENT OF CASE

Petitioner Herman Diamond of Savannah, Georgia, owner of Lot 50, Riverside Subdivision, having 100 foot frontage on the Road, with a depth of 225 feet to the Banks of Richardson Creek, and Warranty Deed to the lower water mark - exactly one-half acre of High Ground.

In June, 1965, Petitioner applied for and received a Corps permit to build a dock and 40 ft. walkway over the Banks

to the High Ground, where in 1966, a deep well and electrical service was supplied.

Petitioner, in 1966, then applied for a dockhouse and a bulkhead and fill to protect the dock and dockhouse. Col. Ramee, District Engineer and Chief of Permits Mr. Blitch, informed Petitioner that a permit was not required and to go ahead.he was covered,. On April 4, 1973, while Petitioner was burying the burnt debris from repairing his dockhouse and dock, which was destroyed by fire in January of 1973.

Dr. Fredrich Marland, of the Georgia State Game and Fish Division, arrived and accused Petitioner of filling the marsh area adjoining Petitioner's property, belonging to Mr. Barrett, who had applied for a permit from the Corps in June 1972. and recieved the permit in May 4,1974. Dr. Marland cursed, whereas, Petitioner informed Dr. Marland his official status was not to harrass and trespass on private property without a warrant. This infuriated Dr. Marland and he had Petitioner arrested for a State Marshland Act of 1970, by two County Police and the State Rangers, that he had called by radio.

On arraignment at the County Courthouse, Mr. Lamar C. Walter, the U.S. Assistant District Attorney was present and made several remarks and the Judge ordered him to leave, since he was not a party to the arrest.

On April 5, 1973, the next day...

Mr. Lamar filed a Civil Complaint CA 3092, for Federal violations of 33 U.S.C. §403,

and 407, Jurisdiction invoked - 28 U.S.C. §1345, (App.4, 5, 6, 7(a), based on the arrest of Petitioner for the State Marshland Act. Petitioner demurred all charges.

On January 22, 1974, Petitioner was tried in Superior Court and a jury of 12, after visiting the site, found Petitioner "NOT GUILTY" of the State Marshland Act (Dx. #25, 8/24/77). Dr. Marland testified that Diamond may have pushed a wheelbarrow of dirt into the adjoining marsh.

The District Court was informed by personal interview with Petitioner.

On March 26, 1974, Permit was denied and based on the denial the District Court issued its Judgment (App. 20, 21(a) on April 17, 1974.

U. S. v. Diamond, 512 F.2d.157, Cert. Denied; 423 U.S. 928 - (5th Cir. 1975) (App. 20, 21(a); on August 28, 1975, Petitioner filed a complaint against the United States of America and the U.S. Army Corps of Engineers, Civil Action pursuant to 5-U.S.C. §702-706, for denial of a permit to bulkhead and a small fill area, alleging that Denial of his permit was (a) arbitrary, (b) capricious, (c) in excess of Corps' Statutory authority, (d) without jurisdiction.

On December 4, 1975, the District Court ordered consolidation of CA 3092 and CV 475-221, pursuant to rule 42(a) of the F.R.C.P. (app. 8a). In the Case of Consolidation CA 3092, the State of Georgia is not a party.

On April 13, 1976, Petitioner filed a motion pursuant to rule 60(b) of the F.R.C.P. (3) that the Court had no Jurisdiction; (4) Fraud; (6) and further relief of the Court - Petitioner amended this motion on June 2, 1976, and June 28, 1977.

On April 17, 1976, a hearing was held to introduce evidence and to have Colonel Kaiser, District Engineer of the Corps, to testify, as he was being transferred overseas.

On April 17, 1977, Petitioner, DIAMOND, filed a Civil Rights and Tort Action against Defendants, DR. FREDRICH MARLAND, STATE OF GEORGIA, ET AL, CV 477-80, in Court of Appeals No. 79-2942, pursuant to 42 U.S.C. 1983 and 1985(3) and 28 U.S.C. 1331 and 1343(3) and Petitioner filed several motions in the interum:

1. Motion for review of Rule 60B (3)(4)(6) F.R.C.P.

2. Motion for an Agency hearing, 28 U.S.C.§556, et seg.

3. Rule 34, F.R.C.P. and a Freedom of Information Act 28 U.S.C.§552.

4. Summary Judgment or Jury Trial.

5. District Engineer has no authority to deny permit.

6. Motion to rescuse Judge Alexander A. Lawrence from presiding at the trials, purusant to 28 U.S.C.§144.

On June 11, 1977, file for petition to the Corps of Engineers, Savannah Division, pursuant to 5 U.S.C.§552 for all copies of Petitioner Diamond's records and correspondence pertaining to his application for a Petition filed an Oral Motion for damages of $500,000.00, in CA 3092 and CV 475-221 (T.8/24/77, p.36).

IN ALL, four hearings were held on the following dates: August 4, 1977, as to all cases CA 3092 and 475-221 and CV 477-80.

Mr. Ralph Snow, Attorney for Petitioner, in CV 477-80, was present and requested the Court to consider the application for disqualification of recusal and the Court overruled the motion (T.8/24/77 p. 3). Mr. Snow retired and the cases procede in CA 3092 and CV 475-221, Petitioner submitted several exhibits and evidence and the Government submitted an offer of 55 ft. of the property to Diamond. The offer was refused (T. 8/24/77 p.16-17) and the Case was continued.

September 30, 1977 Hearing, neither the Government nor the State of Georgia was present. The Court agreed to a hearing on January 3, 1978, WHEREAS, Petitioner submitted a total of 28 exhibits and evidence, accepted by the Court and without objections of the Respondents.

On August 2, 1978, the Court issued orders and Judgment denying all Petitioner's motions in CA 3092 and CV 475-221 (App. 9, 10a) No Final Judgment issued, in regards to CA 3092.

The Judgment for the U.S. and the Corps of Engineers (App. 10(a) in CV 475-221. On August 22, 1978, appeal was filed with the Court of Appeals Fifth Circuit.

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In CV 477-80, a hearing was held on May 10, 1978. The Court admitted to having vacated the Judgment and granted a new trial in CA 3092 (t. p. 86) all facets of conspiracy, fraud and perjury were submitted to the Court.

The Court issued a summary Judgment in CV 477-80 on July 20, 1979 (App. 12(a)

Notice of Appeal filed on July 20, 1979, Petitioner filed a motion to consolidate 78-2969 with 79-2942 for Oral Argument scheduled for March 31, 1980. Court of Appeals granted consolidation February 6, 1980.

Petitioner filed request for one (1) hour Oral Argument. Three (3) cases cannot be argued in 20 minutes and to show all the evidence Petition requested. One hour Oral Argument was denied on February 15, 1980. The Court of Appeals on April 28, 1980 (App. 16, 17(a) affirmed all three (3) cases based on U.S. v. Diamond, 512 F.2d.157. A vacated judgment.

The Court allowed the dock and walkway of 40 feet to be repaired and maintained under a previously authorized permit (App. 16(a). Petitioner petitioned for rehearing. The Court of Appeals denied petitioner motion on May 23, 1980.

On April 28, 1980, Respondent U.S. Government, petitioned for rehearing and clarification was issued (App. 18(a).

Petitioner filed motion for Stay of Mandate on May 30, 1980. Petitioner filed notice of Writ of Certiorari to the Court of Appeals, Fifth Circuit, May 23, 1980.

On July 17, 1980, Petitioner filed with the District Court motion to dismiss CA 3092 for lack of prosecution, pursuant to F.R.C.P., Rule 41(2) or local Rule 15, the Alternative demand for jury trial, pursuant to F.R.C.P., Rule 38.

## ARGUMENT

The right of the states to control and regulate its traffic along the State and federal hyways is unquestionable, therefore waters within its boundries must be given that same right,whether it be navigable or not, so long as it operates within it's own limits. It's waters are its territory and domain as much as the land and hyways within and equally subject to it's laws in all respects with in its own jurisdiction, that of a sovereign over its domain.

The right of Congress to regulate commerce. The correct definition commerce is the transportation and sale of of commodities and not to regulate the rights of a states citizens to the use of their

land or Riparian rights as granted by the states,. Congress has passed no laws to deny these rights pursuant to 33 U.S.C.§ 1, (app 13 a) 33 U.S.C.§ 403 and other similar regulations are ambigious and these permit regulations are interpreted in many different ways by many courts,.

The 33 C.F.R. 209260 (k)(1)(ii) Shoreward limit of jurisdiction, to the Mean Average High Water, preferable over a period of 18.6 years (app 13 a ) This regulation in it's self is ambigious and requires many interpretations in areas of small rivers creeks and lakes within a states sovereign boundries that violates Article 10 of the U.S.Constitution and a taking of private property without due compensation, Art 5.

This Honorable Court has rendered it's opinion in OREGON v.CORVALLIS SAND AND GRAVEL CO. 50 L.ED 2d 550, 97 S.Ct 582 (1977) that State laws govern state owned river beds within it's boundries,

Shively v. Bowley, 152 U.S. 33 and
Kenyon v. Knife 46 Fed 313 (app B)

Many States have made Compacts with the federal government, such as the 1802 Compact with the State of Georgia. (app 1a)
published in Gale and Seaton 1832. No.69 Cession of Georgia. page 125,126.

pursuant to Article 4, New States admitted and Article 6, Constitution and Treaties as the Supreme law of the land, (app 19a) and all Judges shall be bound thereby.

The State of Georgia has riparian rights. State Constitution Art 1 sec 6 para.1 (app 14 a)

THIS HONORABLE COURT, must in all fairness to the state sovereignty and it's citizens render it's opinion and set to rest all court issues and Federal Agency regulation that violate Article 4 and 6 and deny equal protection under the law to the citizens, by declaring, State Riparian Rights are determined by STATE LAW.

2. Pursuant to Title 28 U.S.C.§ 144, petitioner filed timely affidavits to recuse the Late Honorable Judge Alexander Lawrence to disqualify himself from the cases, On two occassions he overruled from the bench, As he stated in a hearing held August 24,1977, ' I did once and I will do it again.' (T. p.2.3) Objections and exceptions are taken to the ruling.

The Court also accused petitioner of being a 'Chronic Litigator and his statement was released to the news and the papers made a big splash of petitioner and held him up to ridicule. (R.p. 92)

The Honorable Judge Lawrence wrote and published many stories about marshes, and protective in that repect.

When Judge Lawrence retired,The U.S. Attorney General, The Honorable Griffen Bell; sponsored a banquiet honoring his services as Judge.

The local papers gave a resume, and gave a history of their services.The Att-General was a retired Appellate Court Judge of the Fifth Circuit and his son, Griffen Bell Jr. was Judge Lawrence's law clerk

for 2 1/2 years, This would be a violat- of Judicial Ethics, personal interest.

**Judge** Griffin Bell was the presiding judge in the Court of Appeal in petioners Case. U.S. v. Diamond 512 F. 2d 157. The statement, That petioners property would have been inundated had it not been filled by comparing the marshlands adjoining property,when no evidence was submitted to show any fill was placed below the Mean High Tides , .an assumption speculative at the best and quite erron= ious pursuant to F.R.CP. Rule 52 (a). Crow Pope Land Inc v. U.S,474 F 2d 200

NRDC v. CALLAWY,392 F Supp 686.687.

2. Navigable Waters (key 35)
Secretary of the Army and the Chief of the Army Corps of Engineers are without authority to amend or change statutory definition of navigable water as used in the Water Act.etc.
[2] have acted unlawfully in adopting the definition of navigable waters in 33 CFR 209260.

1. Revoke and recind much of Federal Register 39 (April 3,1974.etc.

Complaint refers to marshlands adjoing navigable waters, para.3, (app4a)

3. The District Court upon motion from the Government ordered a new trial by Consolidation with CV 475-221, pursuant to F.R.C.P. Rule 42 (a) on December 4,1975.

The Government, Attorney Mr.Lamar Walter

the complaintee,was replaced by Mr. Edward Booth Jr. The lower court in Savannah and Chief Justice Judge Brown of the Fifth Circuit had reprimanded Mr. Lamar Walters for prosicutional misconduct .He is no longer with the U.S. Justice Department.

The three cases were heard on four hearings, August 24,1977, September 30, 1977, January 3,1978 and May 10,1979.

The District Court rendered his orders on August 2,1978 in Ca 3092 and CV 475-221.

Denied all motions of petitinor in CA 3092 and CV 475-221. (app 10,11a) NO FINAL JUDGMENT ISSUED.

Issued a judgment for CV 475-221 in U.S. and Corps of Engineers. (app 9,10a)

Summary Judgment was issued in July 20,1979 in CV 477-80. (app 12a)

The petitioner appealed all cases and were heard on oral argument as of March 30,1980, whereas petitioner appealed the Court of Appeal affirmation subject to modification and removed the dock and walkway from a judgment that had been vacated and no final judgment was re-issued, Petitioner requested a rehearing and clarification,denied,April 28,1980,

The Government requested a rehearing and the Court of appeals changed the words to again reinstate the old vacated judgment on May 23,1980, (app 17,18a)Petitioner

requested a rehearing, Clarification

and recall of mandate, Petitioner had requested to withold mandate, as CA 3092 was in the District Court and petitioner had petitioned for a dismissal or a jury trial, on June 17,1980.

The mandate denies petitioner due process and equal protection and where they have no jurisdiction where no final appealable Judgment was issued.

Consolidation of the cases requires a new judgment for each case and each case retains its own rights.

Johnson v.Manhattan Ry Co. 289 U S 479, 77 L ed 1332 [Courts,586-4]

Mutual Life Insurance Co. v. Hillmon 145 U S 709,710 36 L ED 2d (1891) stated,

Although the defendants might lawfully be compelled at the discretion of the court to try the cases together, the causes of action remain distinct, and no defendant could be deprived without consent of any rights, material to his defense whether by of challenges of jurors objection to evidence, which would have been entitled ifthe cases had been tried seperately (app B rh)

The District Court stated in hearing May 10, 1979, that he had granted a new trial and vacated the judgment, (T.p.86)

28 U S C § 1652, State laws as rules of decisions, GA. Code 70-401 (app 15a)

The district court denied all of petitioner's motions for , F.R.C.P. Rule 60 (b) 3,4,6, That the Court had no jurisdiction over petitioner or his property, FRAUD, that the evendence was fraudulently obtained and that what relief the court could grant.

Petitioner for Rule 34 and the Freedom of Information Act 5 U S C § 552,

Demanded a jury trial or summary judgment.

Requested Jurisdictional Survey as to Army Corps of Engineers Authority.

Petitioned for Recusal of the Judge.

All motions denied August 2 1978 (app 10,11 a) 2 years after consolidation in CA 3092 and CV 475-221.

These denial violates petitioners rights to due process and Equal protection and right to a jury trial, pursuant to Article 4,5, and 7,14 of the Constitution.

The State of Georgia had intervened in the old case, but upon consolidation had not petioned to Intervene, as the states case in the Arrest of petitioner Diamond by Dr Marland was adjudicated in the States Superior Court of Chatham County on January 22, 1974, by a jury of 12 and found 'NOT GUILTY for filling any marsh area as charged, April 4,1973, wheras the District Court was made aware of the verdict before he ordered his judgment on April 17 1974.

The States case was Resi Juda Cata Sitton v. United States 413 F 2d 1386 (5 cir) and the State has no jurisdiction in federal courts when there was no appeal in the states higher courts.

The hearings were held, and submitted several exhibits August 24,1977 on September 30 ,1977 Hearings the state and Government made no appearance, The court allowed for another hearing on January 3,1978, when a total of 28 exhibits were admitted without any objection by the government.

Most of the exhibits were copies of the records held by the Engineers and they clearly indicated that perjury and fraud and conspiracy did prevail and obvious why they were relunctent to issue these copies, and further copies were supplied but to late to submit to the court.

IF THIS HONORABLE COURT WILL REVIEW THE FOUR SHORT TRANSCRIPTS WHERE ALL THE EXHIBITS WERE EXPLAINED IN DETAIL AND CITATION WITH REVIEW OF THE EXHIBITS THIS WILL ESTABLISH FULL PROOF THAT PETITIONER HAS SUFFICIENT PROOF TO GRANT A JURY TRIAL

The April 17,1976 hearing where only the District Engineer Colonel Kaiser was allowed to testify,as he was being sent overseas,

His testimony was that no survey was made as to jurisdiction (T p15,16) and he had not made any survey as to meet

jurisdictional requirements for the requirement of a permit, pursuant to 33 C.F.R. 209260 (k)(1)(ii) (app 13a) as to the mean High tides over a period of 18.6 years,(T p.15-18)

That the topo and survey used as evidence in the original case, was not placed in the right position to show the true position of the property of petitioner. The property was show as being in the marsh area of Mr. Barretts lot.(T.pp 19-24) He also verified that he had not been show petitioners registered survey that verified the testimony of the two witnesses that the property was high fast land and sandy soil.

The Colonel Kaiser's testimony along with the evidence obtained in the copies of petitioners records from the F.O.I,A, 5 U.S.C.§ 552 from the engineers that Mr Young who testified as to Jurisdiction Tidal elevations,there were no records of reports as required to show that he had been where he said he was and no report as to tidal records of Richardson Creek. as verified by Colonel Kaiser's testimony.

Colonel Kaiser, further stated that certain jurisdictional facts were witheld from petitioner. (T. p 6 - 4/17/76)

F.R.C.P. Rule 60 (b) (3)(4)(6) is well substanciated by the testimony and exhibits.

The photo taken by Dr. Marland of the marshland adjoining the property taken on June 28,1973, whereas the tidal information was reported at 7.1 feet, was verified by the U.S.Departmrnt of Commerce as being 8.9 feet,well above Jurisdictional regulations.

The lower court would not allow petitioner to recall the witneses in the new trial, whereas the Government witness Colonel Kaiser was allowed to testify on behalf of the U.S.Army Corps of Engineers.

Denial of due process requires the Court to divest itself of jurisdiction over the person of a defendant where such jurisdiction has been acquired as a result of governments deliberate, unnecessary and unreasonable invasion accused's constitutional rights.

U.S. v. Toscanino, 500 F 2d 267, rehearing denied, 504 F 2d 1380 on remand.

Supression of evidence, Brady v. Maryland 22 A L R Fed. 556

- Phiilips v. Crown Central Petroleum Corp, 556 F 2d 702, injunction vacated

U. S. v. Moss-American, Inc. 78 F.R.D. 214. case dismissed.

U.S. v. Kane, 602 F2d 490-494 Fraud and states rights

Hazel-Atlass Glass Co. v. Hartford-Empire Co, 322 U S 246,248, 88 L Ed 1265.
United States v. Property on Pinto Is. 74 F. Supp 92,93

Navigable Waters, 42 (1).
Riparian Rights of owners of Marsh Is. bounded by mobile Bay were governed by state law.

Crow, Pope, and Land Enterprise,v.U S 474 F.2d 200

405 (12.23) impermissable conclusion of law based on total absence of evidence.

Civil Complaint 3092, was consolidated by order of the Court, as of December 4, 1975, Thereby vacating the old Permenant Injunction, and a new verdict or judgment must issue, No Judgment has been issued and the case is still pending in the lower court, the Judge of the District Court (T. p. 86- 5/10/79) the judgment I made and set aside, is JUDICIAL NOTICE.

The Civil complaint was filed by Mr.Lamar Walter, U.S. Assistant District Attorney for the Southern District of Georgia, on April 5,1973, (app 4-7a) for a criminal violation, of 33 U.S.C.§ 403,407. $500 dollars fine or 6 months in jail. Mr. Walters filed the complaint in the name of the United States government jurisdiction invoked 28 U.S.C§1345, Except as otherwise provided by law:

seeking a permenant injunction and damages, Petioner demurred and filed a cross complaint for damages.

Mr. Walters, prosecuted his own complaint.

The personal unsworn complaint without affidavit, violates Art. 4 of the Constution, as to search and siezures, and without statutory authority of law and without jurisdiction,

United States v. St Regis Paper Co. 355 F 2d 688,689. Except as otherwise provided by law, the complaint has no jurisdiction. U.S. v. Morin(DC Ind) 1866. Federal Case No. 15,654, No injunction

shall issue which had not been adjudicated.
Cohen v. U.S. v. 38 App.DC 123.
no affidavit, no jurisdiction.
74 AM JUR 2d. TORTS § 37 unauthorized prosecution in the name of another.(ARB)

Since December 4,1975, the complaintee has since left the Federal Governments service, and The Government has not submitted any evidence or testimony to prosecute the petitioner, and as June 17,1980 Petitioner has filed a motion to dismiss or a jury trial.

The Secretary of the Army, has published in the Federal Register as of 25 July 1975, Final regulations with an order of the U.S.District Court for the District of Columbia issued on March 27, 1975 in NRDC v. CALLAWAY, et al. 392 F. Supp 686, All fill was grandfathered.

This is part of the information witheld.

Therefore this complaint becomes,Void, EXPOST FACTO. and should be dismissed.

The 1802 Compact between the Federal Government and the State of Georgia takes jurisdiction over the complaint and grant immunity to Petitioner. MISSISSIPPI v. JOHNSON,18 L Ed 475,71 U S 439, These agreements are Irrevocable and Unalterable.

CHEROKEE NATIONS v. THE STATE OF GEORGIA
8 L Ed 2d Peter 5 106 U S 41.
The 18o2 Compact grants Georgia it's full Sovereignty.

4.Court of Appeals has affirmed all three cases,with some modification as to the dock and walkway,Since no final judgment in CA 3092,.The Court has no jurisdiction to make

a final decision for the District Court,

The affirmation of all three cases on a vacated judgment in the old case and where new issues are submitted, therefore these cases must be reviewed on their own merits, to deny petitioner due process and equal protection would violate the 4 th and 14 th Articles of the Constitution.

The modification of the Court of Appeals opinion as to Dock and Walkways by old permit but the additional wording as to fill would in essence issue a new judgment not authorized by the Constitution, since the courts are only Courts of review. (app 16,17,18a)

Consolidation pusuant to C.F.R.P Rule 42 (a) Court order (app 8a)

Judgment in CA 3092 denying all motions (10,11a)

The 1802 Compact of the Federal Government, (1,2,3a) as recorded in the Book of Public Lands, p.125,126 by Gale and Seaton (1832).

When a civil rights action and a tort case for damages is denied petitioner for Constitutional violations and denial of a jury trial and when the Court of Appeals Fifth Circuit and the District Court depart from accepted and usual course of judicial procedure, This Honorable Court must exercise supervision to uphold and protect its citizens.

When an unauthorized without jurisdiction Complaint is filed by a Government agent,who secures several other agents to testify falsely and to induce altered and hearsay evidence to secure a fraudulent permenant injunction over a persons property to deny him the rights to enjoy use and protect to take without just compensation for seven years and more and did not use the machinery that the law provided for the prosecution forwhich the would be violation provided for, constitutes a malicious abuse of legal process,

Whereas the district court grants a new trial and allows the government witness to testify and refuses to grant petitioner the same rights and after 5 years has not issued a final judgment so as to restrain petitioner from the use of private property and ignores the constitutional rights of the individual . Case CA 3092 must be dismissed, Case CV475-221 as for requirement of a permit without jurisdiction, must be held liable for all damages, For just compensation, Tresspass.

Case 79-2942, Whereas the case of Conspiracy,Fraud and perjury can only be proven by facts, therefore this case must be returned for trial as guaranteed by the Constitution.

The Court of Appeals fifth circuit has violated its jurisdictional rights to issue a mandate where no final judgment was issued, and to affirm their mandate by a vacated judgment that mutes the or-

original verdict and decision of the Court of Appeals in April of 1975, the District Court having granted a new trial in December of 1975 supercedes the old verdicte, therefore must vacate their mandate.

The Secretary of the Army and the Chief of the Army Corps of Engineers are without authority to amend or change statutory definition of navigable waters as used in the water Act and they acted unlawfully and in dergation of their responsabilities.

NRDC v.CALLAWY, 392 F. Supp 685 (1975_

U.S. Constitution Art.1,§8,cl 3.

Whereby the Secretary of the Army issued Federal Register, 25 July 1975 by Court order, which included, Grand-Father clause, where permits would not be required, for Marshlands or Wetlands as they are referred too. This includes Petitioner property from a permit, although the property was high fast land.

This Honorable Court must settle the question of"Riparian Rights" pursuant to State law, as in Oregon v. Corvallis.

For the above stated reasons,Petitioner request's this Honorable Court issue a writ of Certiorari.

Respectfully Submitted

Herman Diamond

Herman Diamond, pro se
3610 Macceo Dr.
Savannah, Ga. 31410
Phone (912) 897-2442

# APPENDIX

7th Congress] [1st Session

No. 69

GEORGIA CESSION

Communicated to Congress, April 26, 1802
(American State Papers, Public Lands.
page 125, Gale & Seaton (1832)

Gentlemen of the Senate and the
House of Representatives:

In pursuance of the act entitled, "An act supplemental to the act, entitled An act for an amicable settlement of the limits with the State of Georgia, and authorizing the establishment of a Government in the Mississippi territory," James Madison, Secretary of State, Albert Gallatin, Secretary of the Treasury, and Levi Lincoln, Attorney General of the United States, were appointed commissioners to settle, by compromise, with the commissioners appointed by the State of Georgia, the claims and cession to which the said act has relation.

Articles of agreement and cession have accordingly been entered into, and signed by the said commissioners of the United States and of Georgia; which, as they leave a right to Congress to act upon them legislatively at any time within six months after their date, I have thought it my duty immediately to communicate to the Legislature.

TH: JEFFERSON

April 26, 1802.

City of Washington, April 26, 1802.

Sir:

We have the honor to enclose a copy of an agreement entered into between the commissioners of the United States and those of Georgia in pursuance of the act, entitled, "An act supplemental to the act, entitled An act for an amicable settlement of limits with the State of Georgia, and authorizing the establishment of a Government in the Mississippi territory."

The nature and importance of the transaction have induced the insertion of a clause which renders it necessary that the subject should be communicated to Congress, during their present session.

We have the honor to be, very respectfully, sir, your obedient servants,

JAMES MADISON,
ALBERT GALLATIN,
LEVI LINCOLN.

The President of the United States.

---

ART. II. The United States accept the cession above mentioned, and on the conditions therein expressed: and they cede to the State of Georgia whatever claim, right, or title, they may have to the jurisdiction or soil of any lands lying within the United States, and out

of the proper boundaries of any other State, and situated south of the southern boundaries of the States of Tennessee, North Carolina, and South Carolina, and east of the boundary line hereinabove described, as the eastern boundary of the territory ceded by Georgia to the United States.

In faith whereof the respective commissioners have signed these presents and affixed hereunto their seals.

Done at the city of Washington, in the District of Columbia, this twenty-fourth day of April, one thousand eight hundred and two.

JAMES MADISON, [L.S.]
ALBERT GALLATIN, [L.S.]
LEVI LINCOLN, [L.S.]
Commissioners on the part of the United States.

JAMES JACKSON, [L.S.]
ABRAH. BALDWIN, [L.S.]
JOHN MILLEDGE, [L.S.]
Commissioners on the part of the State of Georgia.

J. Franklin, Senator of the United States for North Carolina,
Samuel A. Otis, Secretary of the Senate of the United States,
John Beckley, Clerk of the House of Representatives of the United States.
) Witnesses

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

| | | |
|---|---|---|
| United States of America, Plaintiff, | ) | |
| v. | ) | CIVIL ACTION |
| Herman Diamond, Defendant. | ) | NO. 3092 |

C O M P L A I N T

NOW COMES the Plaintiff, United States of America, by and through its undersigned counsel, and complaining of the Defendant, HERMAN DIAMOND, alleges and says as follows:

1. This Honorable Court has jurisdiction over this cause ofaction by virtue of the fact that the United States of America is the plaintiff herein (Title 28, United States Code, Section 1345).

2. The defendant is an individual residing and living within the Southern District of Georgia.

3. On April 4, 1973, and at times unknown to the plaintiff, and prior thereto, and continuing through until the present time, the defendant and others acting as agents of said defendant jointly and severally undertook the fill of estuarine marshlands within the

navigable waters of the United States in a marsh adjacent to Richardson Creek, Oatland Island, Chatham County, Georgia; and thereby threw, discharged, deposited, caused to be deposited, procured to be thrown, and suffered to be deposited from the shore, within the navigable waters of the United States, refuse, which includes but is not limited to the following: roots or stumps, broken concrete, construction materials, and dirt, in violation of the provisions of Title 33 United States Code, Section 407; and further, defendant has created an obstruction to navigation within the navigable waters of the United States, to wit: the estuarine marshlands adjacent to Richardson Creek, Oatland Island, the said obstruction not being affirmatively authorized by Congress and, therefore, prohibited by and in violation of Title 33, United States Code, Section 403.

4. No Department of the Army permit for dumping of fill within the navigable waters of Richardson Creek, Oatland Island, has been issued to the defendant. Defendant has not applied for said permit.

5. Upon information and belief, it is alleged that the defendant has not ceased the said depositing of refuse within the navigable waters of the United States.

6. The said refuse now lying within the estuarine marshlands of the United States is and represents an irreparable damage and harm to the plaintiff and to the people of the United States.

7. The said deposit of refuse within the navigable waters of the United States, if allowed to remain, will further impair and destroy the navigable waters of Richardson Creek, Oatland Island.

8. Unless defendant, HERMAN DIAMOND, and his agents are restrained from further depositing of refuse within the navigable waters of the United States the same will continue in their efforts to complete the unauthorized land fill operation.

WHEREFORE, the plaintiff prays to the Court:

1. That a permanent Injunction issue to restrain and enjoin the defendant from further depositing or dumping of refuse of any kind within the navigable waters of the United States, particularly in the marshlands of Richardson Creek, Oatland Island, Chatham County, Georgia, the said dumping or depositing of refuse being in direct violation of the laws of the United States; and

2. That an Order issue mandatorily compelling the defendant to remove the said refuse heretofore deposited within

the navigable waters of the United States in said area; or

3. In the alternative, that the Court award damages to the plaintiff, both compensatory and punitive, along with the costs of this action, and such other and further relief as the Court may deem just, reasonable, and proper.

Lamar C. Walter
Assistant United States Attorney

Address:

P. O. Box 8999
Savannah, Georgia 31402

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

| | |
|---|---|
| Herman Diamond, Plaintiff, v. United States of America and United States Army Corps of Engineers, Savannah District, Defendants, | CIVIL ACTION NO. 475-221 |

O R D E R

The defendants have filed a motion to consolidate the above action with Civil Action Number 3092, United States v. Herman Diamond, now pending before this Court. The Court having read and considered the motion is of the opinion that consolidation is proper under Rule 42 (a) of the Federal Rules of Civil Procedure. Accordingly, and for good cause thus appearing, it is,

ORDERED, ADJUDGED, and DECREED that Civil Action Number 475-221, Herman Diamond v. United States of America and United States Army Corps of Engineers, Savannah District, be and the same is

hereby consolidated with Civil Action Number 3092, United States v. Herman Diamond.

This 4th day of December, 1975.

Alexander A. Lawrence
Chief Judge, United States
District Court, Southern
District of Georgia

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UNITED STATES DISTRICT COURT
For the
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action File No. CV475-221

| | | |
|---|---|---|
| HERMAND DIAMOND | ] | |
| | ] | |
| vs. | ] | |
| | ] | |
| UNITED STATES OF AMERICA | ] | JUDGMENT |
| AND UNITED STATES ARMY | ] | |
| CORPS OF ENGINEERS, | ] | |
| SAVANNAH DISTRICT | ] | |

This action came on for (hearing) before the Court, Honorable Alexander A. Lawrence, United States District Judge, presiding, and the issues having been duly (heard) and a decision haing been duly rendered.

It is Ordered and Adjudged that in accordance with such decision Judgment is hereby rendered in favor of the Defendants, UNITED STATES OF AMERICA AND UNITED STATES ARMY CORPS OF ENGINEERS, SAVANNAH DISTRICT, and against the Plaintiff, HERMAN DIAMOND.

Dated at Savannah, Georgia, this 2nd day of August, 1978.

Louis E. Aenchbacher
Clerk of Court

By: Michael M. Aarrett
Deputy Clerk

---

UNITED STATES DISTRICT COURT
For the
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action File No. 3092

UNITED STATES OF AMERICA ]
vs. ] JUDGMENT
HERMAN DIAMOND ]

This action came on for (hearing) before the Court, Honorable Alexander A. Lawrence, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that in accordance with such decision Diamond's various motions pending in Civil Action No. 3092 and CV475-221 are overruled.

Dated at Savannah, Georgia, this 2nd day of August, 1978.

Louis E. Aenchbacher
Clerk of Court

By: Michael M. Aarrett
Deputy Clerk

UNITED STATES DISTRICT COURT
For the
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action File No. CV477-80

HERMAN DIAMOND

vs.

DR. FREDERICK C. MARLAND, Department of Natural Resources, State of Georgia; COLONEL EDWIN C. KEISER, District Engineer; COLONEL FRANK WALTER, District Engineer: STEVEN OSVALD, Permit Section, Engineers; WILLIAM L. YOUNG, Engineer; EDWARD MYATT, Engineer: GLENN F. MACAULEY, of the United States Corps of Engineers, Savannah, Georgia, District

This action came on for (hearing) before the Court, Honorable Alexander A. Lawrence, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that in accordance with such decision the Defendants' motions for summary judgment are granted and the conspiracy action is hereby dismissed.

Dated at Savannah, Georgia, this 20th day of July, 1979.

HENRY R. CRUMLEY,JR.
Clerk of Court

## Title 33 U.S.C. Sec. 1

### REGULATIONS BY SECRETARY OF THE ARMY FOR NAVIGATION OF WATERS GENERALLY

It shall be the duty of the Secretary of the Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations of the United States in channel improvement, covering all matters not specifically delegated by law to some other executive department. Such regulations shall be posted, in conspicuous and appropriate places, for the information of the public.

### CODE OF FEDERAL REGULATIONS (1973)

§209.260(K)(1)(ii). (p.362) Shoreward limit of jurisdiction. Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water.

Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years.

### LAWS OF THE STATE OF GEORGIA

85-1308. Rights of owners of land adjacent - to navigable tidewaters. --

For all purposes ..... the boundaries and rights of owners of land adjacent to or covered in whole or in part by navigable tidewaters, as defined in the preceding section, shall extend to low water mark in the bed of the water. Provided however, that nothing in this and the two preceding sections shall be so construed as to authorize such an exclusive appropriation of any tidewater, navigable or nonnavigable, by any person whomsoever, as to prevent the free use of the same by others, for purposes of passage and for the transportation of such freights as may be capable of being carried thereover. (Acts 1902, p. 108)

85-1310. Levees and ditches; construction authorized. -- All persons owning, or who may hereafter own, lands on any watercourses are authorized and empowered to ditch and embank their lands, so as to protect the same from freshets and overflows in said watercourses: Provided always, that the said ditching and embanking does not divert said watercourse from its ordinary channel.

GEORGIA STATE CONSTITUTION
Art. 1, Sec. 6, Par. 1

Tidewater titles: confirmed. The Act of the General Assembly approved December 16, 1902, which extends the title of ownership of lands abutting on tidal water to low water mark is hereby ratified and confirmed.

LAWS OF THE STATE OF GEORGIA

70-401. Time of new trial. - When a new trial has been granted by the superior court, the case shall stand on the docket for trial at the next term as though no trial had been had, subject to the Rules for continuances provided in this Code.

105-1401. Interfering with enjoyment of private property. - The right of enjoyment of private property being an absolute right of every citizen, every act or another which unlawfully interferes with such enjoyment is a tort for which an action shall lie.

105-1402. Right of possession. - The bare right to possession of lands shall authorize their recovery by the owner of such right, and also damages for the withholding of the right.

105-1406. Damages for continuing trespass. - Damages for a continuing trespass are limited to those which have occurred before action is commenced. Subsequent damages flowing from a continuance of the trespass give a new cause of action.

105-1409. Rights above and below the surface. - The owner of realty having title downwards and upwards indefinitely, an unlawful interference with his rights, below or above the surface, alike gives him a right of action.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

Nos. 78-2969 and
79-2942

DO NOT
PUBLISH

---

UNITED STATES OF AMERICA and
STATE OF GEORGIA,
Plaintiffs-Appellees,

versus

HERMAN DIAMOND,
Defendant-Appellant.

* * * * * * * * * * *

HERMAN DIAMOND,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA and
UNITED STATES ARMY CORPS OF
ENGINEERS, Savannah District,
Defendants-Appellees.

---

HERMAN DIAMOND,
Plaintiff-Appellant,

versus

DR. FREDERICK C. MARLAND,
Dept. of Natural Resources,
State of Georgia, ET AL,
Defendants-Appellees.

---

(continued)

Appeals from the United States District Court for the Southern District of Georgia

---

[April 28, 1980]

Before GOLDBERG, CHARLES CLARK and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

The Court finds that the appellant, HERMAN DIAMOND, has the right to rebuild or repair and to maintain a dock and walkway at the same location the original dock and walkway were authorized and built under a previously issued United States Army Corps of Engineers permit, and finds that no addition or removal of fill material on any part of the lands owned by Diamond in the Richardson Creek area is to be required or permitted in connection with any rebuilding, repair or maintenance of such dock and walkway. We therefore affirm.[1] See Local Rule 21.[2]

AFFIRMED.

(continued)

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[1] United States v. Diamond, 512 F.2d 157 (5th Cir.), cert. denied, 423 U.S.928 (1975).

[2] See N.L.R.B. v. Amalgamated Clothing Workers of America, 430 F.2d 966 (5th Cir.) 1970.

Appellees' petition for clarification of the Court's opinion entered on April 28, 1980, is granted.

The preceding sentence in our original opinion is deleted and the sentence set out below is substituted therefor:

The court finds that the appellant, HERMAND DIAMOND, has the right to rebuild or repair and to maintain a dock and walkway at the same location the original dock and walkway were authorized and built under a previously issued United States Corps of Engineers permit, provided however, the right to rebuild or repair and to maintain the previously authorized dock and walkway does not include the right to place additional fill material on any part of the lands owned by Diamond in the Richardson Creek area.

---

15-101. BOUNDARIES OF THE STATE. - The boundaries of Georgia as deduced from the Constitution of Beaufort, the Articles of Cession and Agreement with the United States of America entered into on the 24th of April 1802.

15-201. EXTENT OF SOVEREIGNTY AND JURISDICTION. The sovereignty and jurisdiction of this State extend to all places within the limits of her boundaries, except so far as she has voluntarily ceded the same to the United States or adjacent States over particular localities.

# ARTICLES OF THE CONSTITUTION

Art. 4. Sec. 3. Parg. 1:

New States Admitted. New states may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

Art. 6. Sec. 1. Parg. 2:

Constitution and Treaties as the Supreme Law. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

VACATED JUDGMENT IN CA 3092

United States District Court
Southern District of Georgia
Savannah Division

| | | |
|---|---|---|
| United States of America | ] | |
| v. | ] | Civil No. 3092 |
| Herman Diamond | ] | |

JUDGMENT

This cause came on to be heard on the complaint of the United States of America, plaintiff, and the Court having heard oral evidence and admitted exhibits in open court and the Court having entered its findings of fact and conclusions of law on April 17, 1974, and it further appearing to the court that the defendant is committing acts and is about to commit acts as set forth in plaintiff's complaint, and will continue to do so unless restrained by order of this court, and that the said acts have caused irreparable injury and damage to the marshlands described in the complaint and that immediate and irreparable injury, loss or damage to the described area will result and that the activities described in the complaint have been conducted by Herman Diamond without a permit from the Secretary of Army as required by 33 U.S.C. Section 403, and are in direct violation of the laws of the United States. (con't.)

IT IS ORDERED, ADJUDGED AND DECREED that the defendant, Herman Diamond, his servants, agents, employees, attorneys, successors, and assigns, and each of them, be permanently enjoined and restrained from engaging in or permitting suffering, or causing, directly or indirectly, any fill or construction operations on the area in dispute, bounded on the north by Richardson Creek and on the south by Oatland Island Road, Chatham County, Georgia.

This 17th day of April, 1974.

Alexander A. Lawrence
Chief Judge,
United States District
Court

Supreme Court, U. S.
FILED
SEP 16 1980
MICHAEL RODAK, JR., CLERK

No. 80-190

# In the Supreme Court of the United States

OCTOBER TERM, 1979

---

HERMAN DIAMOND, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

---

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# In the Supreme Court of the United States

OCTOBER TERM, 1979

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HERMAN DIAMOND, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

---

### QUESTIONS PRESENTED

1. Whether the United States' exercise of regulatory jurisdiction over Georgia tidal marshlands within the navigable waters of the United States pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, is prohibited by an 1802 agreement between the United States and the State of Georgia establishing the boundaries of that state or this Court's

decision in *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).

2. Whether the district judge erred in denying petitioner's application for his recusal.

3. Whether the United States Attorney was authorized to file and prosecute a civil action to enjoin petitioner, who had not obtained the necessary permit from the Corps of Engineers, from filling a tidal marsh in the navigable waters of the United States.

4. Whether petitioner was denied due process by the district court's consolidation of the two cases on review here.

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## OPINIONS BELOW

The April 28, 1980, opinion of the court of appeals and the June 24, 1980, substitute opinion of the court of appeals rendered on the government's petition for rehearing in the nature of clarification (Pet. App. 16a–18a) are not reported. The district court's August 2, 1978, opinion denying petitioner's motion to set aside the judgment in Civ. Action No. 3092 (App. A, *infra*, 1a–13a) and its August 2, 1978, opinion in Civ. Action No. 475–221 (App. B, *infra*, 14a–21a) are not reported. The district court's order of May 9, 1979, denying petitioner's application for recusal (App. C, *infra*, 22a–25a) and the July 20, 1979, order granting summary judgment to the defendants in Civ. Action No. 477–80 (App. D, *infra*, 26a–35a) are likewise not reported.[1]

The district court's previous opinion in Civ. Action No. 3092 is not reported. The Fifth Circuit's opinion affirming the district court's judgment on the earlier occasion is reported at 512 F.2d 157 (1975), and this Court's denial of certiorari is reported at 423 U.S. 928 (1975).

## JURISDICTION

The judgment of the court of appeals was entered on April 28, 1980. Petitioner's petition for rehearing was denied on May 23, 1980. The government's petition for rehearing in the nature of clarification was granted, and a substitute opinion was rendered on June 24, 1980. Petitioner's petition for rehearing, reclarifica-

[1] The district court opinions were not included in petitioner's appendix and have therefore been reproduced here.

tion, and recall of mandate was denied on July 21, 1980. The petition for a writ of certiorari was filed on August 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is the owner of a tract of tidal marshland along Richardson Creek, a navigable tributary of the Wilmington River located in Chatham County, Georgia. In 1965, petitioner received permission from the United States Army Corps of Engineers to build a dock into Richardson Creek, but did not apply for a permit to fill the land. Petitioner began filling his property in 1966 and continued through 1973. Commencing in 1972, representatives of the Corps and the Georgia Department of Natural Resources repeatedly informed petitioner that the filling was unauthorized and illegal.[2] Thereafter, on April 5, 1973, the United States filed an action against petitioner in the United States District Court for the Southern District of Georgia seeking a permanent injunction against further filling of the tidal marsh and a mandatory injunction to compel removal of the illegally placed fill. The State of Georgia was granted leave to intervene as a plaintiff. The district court found that the area that had been filled by petitioner was within the navigable waters of the United States and that petitioner's filling in the absence of a Corps of Engineers permit violated Section 10 of the Rivers and Harbors Act of

[2] As a result of one encounter, petitioner was arrested and charged in Chatham County Court with the misdemeanor offense of filling marshland without a state permit. Petitioner was acquitted, after a jury trial, on January 22, 1974.

1899, 33 U.S.C. 403. The district court therefore permanently enjoined petitioner from further fill activities on his property. *United States* v. *Diamond*, Civ. Action No. 3092 (S.D. Ga. April 17, 1974).

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed. *United States* v. *Diamond*, 512 F.2d 157 (1975). The Fifth Circuit rejected, *inter alia*, petitioner's arguments that the United States Attorney had not been authorized to commence or prosecute the action and that petitioner's filled property did not lie within the navigable waters of the United States. Petitioner then sought review in this Court, raising, *inter alia*, the question whether the United States' exercise of regulatory jurisdiction over Georgia tidal marshlands within the navigable waters of the United States conflicts with the 1802 "Georgia Cession" (1 *American State Papers (Class VIII)—Public Lands*, Document No. 69 (Lowrie ed. 1834) (Pet App. 1a-2a)) establishing the boundaries of that state. No. 75-287, O.T. 1975, Pet. 9. This Court denied certiorari. 423 U.S. 928 (1975).

2. Petitioner had filed an application with the Corps of Engineers for an after-the-fact permit to authorize existing and future fill. The Corps denied this permit application on March 26, 1974, citing detrimental effects of the proposed fill and adverse comments from interested parties and the State of Georgia. See 33 C.F.R. 209.120(f) (1974). Petitioner than filed an action in the United States District Court for the Southern District of Georgia, *Diamond* v. *United States*, Civ. Action No. 475-221, to obtain judicial review of the permit denial. The district court granted the gov-

ernment's motion to consolidate this action with Civ. Action No. 3092, the government's injunctive action discussed above. Petitioner also filed motions under Fed. R. Civ. P. 60(b) seeking relief from the judgment in Civ. Action No. 3092 on various grounds and moved to set aside the order consolidating the two cases.

On August 2, 1978, the district court rendered two separate opinions, one denying the Rule 60(b) motions in Civ. Action No. 3092 (App. A, *infra*) and the other upholding the denial of the after-the-fact permit in Civ. Action No. 475-221 (App. B, *infra*). The court found that petitioner's motions to set aside the judgment in Civ. Action No. 3092 were untimely in part and were, in any event, without merit. The court rejected petitioner's renewed arguments that the filled tidal marsh lies outside the navigable waters of the United States, that the land is outside the jurisdiction of the Corps of Engineers under the 1802 "Georgia Cession" or 16 U.S.C. 662(h), and that the filing of the government's original complaint was unauthorized. In Civ. Action No. 475-221, the district court found that the Corps' denial of a permit was rational and in accordance with law. The court also denied petitioner's motion to set aside the consolidation of the two actions, citing its broad discretion in the management of its own docket (App. A, *infra*, at 12a-13a).

3. In the interim, petitioner had commenced *Diamond* v. *Marland*, Civ. Action No. 477-80 (S.D. Ga.), a civil rights damage action against an official of the Georgia Department of Natural Resources and various officials of the Corps of Engineers, charging that the defendants caused him to be illegally arrested

in 1973 (see page 2, note 2, *supra*), had conspired to secure filing of the complaint in the government's injunctive action (Civ. Action No. 3092), and had presented false or misleading testimony or prepared misleading evidence in that case. Petitioner moved to disqualify District Judge Lawrence in this damage action pursuant to 28 U.S.C. 144. The application rested essentially upon the Judge's conduct of the government's injunctive action. This application was denied from the bench, and the court subsequently received a letter from petitioner's counsel disclaiming any intention to pursue the matter (App. C, *infra*, 23a, n.2)

On May 7, 1979, three days prior to a scheduled hearing on defendants' motions for summary judgment in the damage action, petitioner, by then acting *pro se*, filed a "Complaint and Injunction," designated Civ. Action No. 479–159, by which he again sought to disqualify the District Judge from continuing to preside in the damage action. He alleged personal bias and recited in addition that Judge Lawrence had ruled against him regarding the 1802 "Georgia Cession" and had confiscated petitioner's property. Treating the complaint as a renewed application for recusal pursuant to 28 U.S.C. 144 and 455, the district court denied the application (App. C, *infra*). The court noted that all of petitioner's allegations, save one, complained of his judicial conduct and essentially challenged prior rulings. The remaining allegation, asserting the judge's membership in a club claimed to exclude members of an unspecified "minority class" to which petitioner allegedly belongs, was found legally insufficient to support disqualification.

The district court entered an opinion on July 20, 1979, granting summary judgment as to all defendants who had been served in the damage action (App. D, *infra*). The court held that all of petitioner's claims were barred by *res judicata* and collateral estoppel based upon the judgments in Civ. Action Nos. 3092 and 475–221, *supra*, and a prior damage action in which the district court had also granted summary judgment for the defendants. *Diamond* v. *Marland*, 395 F. Supp. 432 (S.D. Ga. 1975).[3]

4. The court of appeals affirmed the various judgments and orders appealed from in a single per curiam opinion (Pet. App. 16a–18a), stating only that its ruling did not impair petitioner's right to maintain a dock, as distinguished from filling.[4]

## ARGUMENT

The decision below is correct, does not conflict with any decision of this Court or any court of appeals, and does not present any issue warranting review by this Court. The petition for certiorari is the culmination of years of litigation in numerous actions and seeks to re-open matters that were fairly, correctly, and finally decided.

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[3] Petitioner did not appeal the adverse judgment in the earlier damage action.

[4] In addition to the actions discussed above, petitioner brought a damage action against the Assistant United States Attorney who handled Civ. Action No. 3092. Summary judgment was granted to the defendant based upon official immunity. *Diamond* v. *Walter*, Civ. Action No. 479–87 (S.D. Ga.). The court of appeals affirmed on August 5, 1980. *Diamond* v. *Walter*, No. 80–7121 (5th Cir.). Petitioner has petitioned for rehearing.

1. Petitioner asserts (Pet. 8–10) that, despite the provisions of the Rivers and Harbors Act of 1899, the State of Georgia has exclusive jurisdiction to regulate activities, including fill, in navigable waters within its boundaries. This is plainly incorrect. See, *e.g.*, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 171–172 (1979), and cases cited therein. In support of his contention, petitioner cites the 1802 "Georgia Cession," an agreement negotiated between commissioners representing the United States and comissioners representing Georgia, fixing the boundaries of that State and ceding excess territory claimed by Georgia to the United States.[5] Nothing in this agreement, authorized by the Act of April 7, 1798, ch. 28, 1 Stat. 549, and the Act of May 10, 1800, ch. 50, 2 Stat. 69, relinquishes the power of the United States under the Commerce Clause (see *Kaiser Aetna* v. *United States*, *supra*) to regulate the use of navigable waters.[6] Petitioner mistakes a disclaimer of federal title for relinquishment of regulatory power. Federal power to regulate placement of fill in the navigable waters of the United States does not depend on title to land. *Zabel* v. *Tabb*, 430 F.2d 199, 206 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971); cf. *United States* v. *Rands*, 389 U.S. 121, 127 (1967). Petitioner's reliance on *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429

[5] As noted at page 3, *supra*, petitioner raised this issue in his earlier petition for certiorari in No. 75-287.

[6] Article II of the Cession (Pet. App. 2a–3a), on which petitioner apparently relies, merely disclaims any federal assertion of plenary jurisdiction of the kind exercised in the territories as to lands within the Georgia boundaries established. Georgia's sovereignty within its boundaries thus remained equal to that of all other states.

U.S. 363 (1977), is misplaced for the same reason. *Corvallis* holds only that state law ordinarily controls the determination of the effect of movement of a navigable river upon title to the riverbed. The determination of title is not in issue here.

2. Petitioner challenges (Pet. 10–11) Judge Lawrence's denial of his application for recusal. The application stated no grounds sufficient to require recusal. It is fundamental that in order to require recusal the "alleged bias and prejudice * * * must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966). Here, petitioner's allegations related to past judicial rulings. Disqualification was not appropriate in these circumstances. See, *e.g.*, *In re International Business Machines Corp.*, 618 F.2d 923, 928 (2d Cir. 1980). The remaining ground offered in support of the request for recusal—the district judge's alleged membership in a club excluding members of an unspecified class including petitioner—is insufficient to show personal bias infecting the court's ruling. *Parrish* v. *Board of Commissioners of the Alabama State Bar*, 524 F.2d 98, 101 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976); cf. *Parker Precision Products Co.* v. *Metropolitan Life Ins. Co.*, 407 F.2d 1070, 1077–1078 (3d Cir. 1969).[7]

[7] Petitioner has now urged (Pet. 10–11) new grounds for disqualification pertaining to the district judge's personal associations, which were not presented below. They should not be considered here. In any event they present no more basis for recusal than the grounds previously urged. We also question the

3. Petitioner challenges (Pet. 18–19) the authority of the United States Attorney to file and prosecute Civ. Action No. 3092. He argued this point unsuccessfully to the Fifth Circuit on his first appeal in 1975 (*United States* v. *Diamond, supra,* 512 F.2d at 159), but declined to raise it in his petition for certiorari seeking review of that judgment. Petitioner's contention is, in any event, without merit. Pursuant to 33 U.S.C. 413, it is the responsibility of the Department of Justice to "conduct the legal proceedings necessary to enforce the provisions of * * * [33 U.S.C.] 403 * * *." This responsibility may be carried out through the appropriate United States Attorney. 28 U.S.C. 547.[8]

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timeliness of petitioner's May 7, 1979, application for recusal. See 28 U.S.C. 144; *In re International Business Machines Corp., supra,* 618 F.2d at 932.

[8]Petitioner has previously argued that the filing of the complaint in Civ. Action No. 3092 was unauthorized, absent a request therefor from the Secretary of the Army or his delegate. On petitioner's first appeal to the Fifth Circuit, that court correctly concluded that no such request was necessary. *United States* v. *Diamond, supra,* 512 F.2d at 159. Moreover, the record below shows that a request was in fact made.

Petitioner's allegations (Pet. 11–12) of misconduct by the attorney for the government are utterly unfounded. Petitioner's claims apparently refer to an unrelated case, because Chief Judge Brown, who petitioner asserts questioned Assistant United States Attorney Walter's conduct, was not on the panel that rendered either of the court of appeals' opinions in this litigation. We were informed by the United States Attorney's Office that the incident to which petitioner probably refers was a suggestion by Chief Judge Brown at oral argument in an unrelated criminal case that, inasmuch as Mr. Walter's conduct of the prosecution had been questioned, albeit unsuccessfully, it would have been preferable to assign the appellate argument for the government to another attorney. No court reprimanded Mr. Walter for prosecutorial misconduct, nor was he severed in-

4. Petitioner seems to perceive (Pet. 19–22) a denial of due process in the court of appeals' citation of its earlier decision in *United States* v. *Diamond*, 512 F.2d 157, cert. denied, 423 U.S. 928 (1975). Petitioner describes the earlier judgment as vacated. This is incorrect. The court of appeals never vacated its judgment. Petitioner apparently argues that the district court's consolidation of Civ. Action No. 475–221 (the action for review of the Corps' denial of an after-the-fact permit) with Civ. Action No. 3092 automatically vacated the judgment of the district court in the latter case, which had by then been affirmed by the court of appeals, with review denied by this Court. It is a sufficient answer to this novel contention to note that the consolidation of cases does not destroy the separate identity of each. *Johnson* v. *Manhattan Ry.*, 289 U.S. 479, 496–497 (1933); *Zdanok* v. *Glidden Co., Durkee Famous Foods Division*, 327 F.2d 944 (2d Cir.), cert. denied, 377 U.S. 934 (1964).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

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*Attorneys*

SEPTEMBER 1980

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voluntarily from employment with the United States Department of Justice.

# APPENDIX A

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION**

Civil Action No. 3092
Civil Action No. 475–211

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

HERMAN DIAMOND, DEFENDANT

HERMAN DIAMOND, PLAINTIFF

*v.*

UNITED STATES OF AMERICA AND UNITED STATES ARMY CORPS OF ENGINEERS, SAVANNAH DISTRICT, DEFENDANTS

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*OPINION AND ORDER ON DIAMOND'S MOTIONS TO SET ASIDE PRIOR JUDGMENT AND ORDER OF CONSOLIDATION OF THE TWO ACTIONS*

I

On April 5, 1973, the United States filed a suit against Herman Diamond. I will hereafter refer to this action as Suit One. The complaint alleged that defendant was illegally filling estuarine marshes in violation

of 33 U.S.C. §§ 403 and 407.[1] The land in question is marshland lying on Richardson Creek in Chatham County, Georgia. The Government sought a permanent injunction against further filling and a mandatory injunction to remove existing fill or, alternatively, compensatory and punitive damages.

I entered a temporary restraining order on the same day the action was filed.

On April 7, 1973, the State of Goergia requested leave to intervene in the action. The Intervenor sought a permanent injunction, pursuant to State law and regulations, against further filling of the coastal marshlands of Georgia. I granted the motion subject to objection by defendant. The intervention raised the question of the State's title to marshlands. I have never ruled on that issue and do not intend to.

On June 14, 1973, Mr. Diamond applied to the Corps of Engineers for an after-the-fact permit allowing him to continue the fill operations on his property. In a letter dated March 26, 1974, the District Engineer denied such application on the ground that "the issuance of an After-the-Fact Permit for the proposed and existing fill would not be in the public interest. . . ."

An Opinion-Order was issued in Suit One on April 17, 1974. In it this Court found that Richardson Creek was navigable within the meaning of the Rivers and Harbors Act of 1899. "Defendant filled the two-acre

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[1] Section 403 prohibits "creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States. . . ." Section 407 prohibits discharging or depositing any refuse into navigable waters or tributaries of navigable waters.

marsh area without a Permit from the Army and continued to fill after being warned that such activity was illegal." I further ruled that "the area filled in by Mr. Diamond would have been inundated at mean high water had not the same been filled" and that as a matter of law the fill area was within the navigable waters of the United States. Diamond had violated the Rivers and Harbors Act, this Court held, by filling marshland without a permit.

Subsequently, a permanent injunction issued prohibiting further fill or construction operations on the site. I abstained, however, from ruling on the mandatory injunction pending outcome of the administrative process. See *United States* v. *Moretti, Inc.*, 478 F.2d 413 (5th Cir.).

In *United States* v. *Diamond*, 512 F.2d 157 the Fifth Circuit affirmed this Court's ruling. Application for certiorari was denied, 423 U.S. 928.

On August 28, 1975, Diamond filed the instant suit in this Court under the Administrative Procedure Act (5 U.S.C. § 701 *et seq.*). It is denominated as Suit Two.[2] In it Diamond sought review of the agency's action, alleging that the denial of the permit was arbitrary and capricious and that it exceeded the Corps' statutory authority. In December, 1975 this Court consolidated the two suits, pursuant to Rule 42(a). Almost a year after filing Suit Two, Mr. Diamond filed a motion for stay and remand for completion of the

[2]There is also a third suit currently pending, Herman Diamond v. Dr. Frederick C. Marland et al. CV 477–80. In that suit, Mr. Diamond revives a claim decided against him in *Diamond* v. *Marland*, 395 F. Supp. 432 (S.D., Ga.).

administrative proceedings then in process. Concluding that Mr. Diamond's administrative remedies had been exhausted, I denied the motion in an Order dated August 9, 1976.

Undaunted by the adverse decisions of the Corps of Engineers, this Court and the Fifth Circuit, Diamond (who proceeds *pro se*) has filed numerous post-judgment motions in which he seeks the reopening and reconsideration of both Suits One and Two. I will consider first the motions pending in Suit One and then take up the motion in Suit Two.

II

On April 13, 1976, Diamond filed a motion pursuant to Rule 60(b) for relief from the judgment in Suit One. Alleging additional grounds for relief, he sought to amend this motion on June 2, 1976, and on June 28, 1977.[3] In all, Diamond enumerates six bases for setting aside the judgment in Suit One. In his briefs and letters to this Court, defendant raises still other grounds which might be construed as additional grounds for his motion.

The simple truth of the matter is that Mr. Diamond is trying to relitigate a case decided against him by this Court in 1974 and affirmed by the Fifth Circuit on appeal.

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[3] Rule 60(b) provides that motions must be made within a reasonable time or, if under 60(b)(1), (2), or (3), within one year from judgment. The random approach Mr. Diamond has taken appears to put him beyond a reasonable time. However, I do not decide the motions on that basis except where the one year limitation is applicable.

## III

Rule 60(b) provides for relief from judgments on several grounds.[4] Whether to grant relief from judgment under Rule 60(b) is within the sound discretion of the district court. *Fackelman* v. *Bell*, 564 F.2d 734 (5th Cir.); *Hand* v. *United States*, 441 F.2d 529 (5th Cir.).

The Government contends that this Court lacks jurisdiction over the 60(b) motions because the judgment in question was affirmed on appeal. It cited *Butcher & Sherrerd* v. *Welsh*, 206 F.2d 259 (3rd Cir.) in support of that position. That view was changed by the decision of the Supreme Court of the United States in *Standard Oil Co. of California* v. *United States*, 429 U.S. 17. In that case, the Supreme Court held that a district court does not need appellate permission to reopen a case after it has been reviewed on appeal and affirmed. The Court found the reasons supporting the requirement of appellate leave to be unpersuasive and stated that "we have confidence in the ability of district courts to recognize frivolous Rule 60(b) motions." 429 U.S. at 19.

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[4] "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, suprise, or excusable neglect; (2) newly discovered evidence . . .; (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied . . . ; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . ."

I will take up now Diamond's various motions and the applicable subsections of Rule 60(b).

IV

In his original post-judgment motion, Diamond argued that the judgment should be set aside under 60(b)(6) because Government Exhibit 1 is inaccurate and was not introduced in evidence.[5] He alleges that my Order of April 17, 1974, was substantially based on this exhibit. He contends that the overlay of aerial photographs attached to the exhibit was not properly superimposed and did not correctly indicate his property and fill area. In one of the amendments, Diamond claims that the survey of his property by the Corps was inaccurate and that reliance thereon constituted fraudulent misrepresentation and misconduct.[6]

The motion is ostensibly based on Rule 60(b)(6) which provides for relief for any other reason justifying same. However, it must be considered as one under 60(b)(3). Motions to set aside for misrepresentation or misconduct fall within 60(b)(3). "Where either Clauses (b)(1), (2), (3), (4), or (5) provide coverage for the movant's claim, relief may not be obtained pur-

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[5]The record reflects that the Exhibit was introduced at the hearing on August 29, 1973. See also "Clerk's Certificate As to Exhibits" sent up on appeal. Even if it were not introduced, the objection should have been made at the time or, at least, within one year of judgment.

[6]Although this motion is decided on the technical ground of Rule 60(b), I impute no fraud or misconduct to the Government or its witnesses. I do not believe or find that any fraud was perpetrated upon this Court. See generally *England* v. *Doyle*, 281 F.2d 304 (9th Cir.).

suant to Clause (b)(6)." *Gulf Coast Building and Supply Company* v. *International Brotherhood of Electrical Workers, Local No. 480*, 460 F.2d 105 (5th Cir.). See also *Ackermann* v. *United States*, 340 U.S. 193; *Klapprott* v. *United States*, 335 U.S. 601.

As stated, motions under 60(b)(3) must be brought within one year of the judgment. Since the motion to set aside was filed more than two years after judgment, it must be dismissed as untimely filed. See *Prickett* v. *Duke Power Company*, 49 F.R.D. 116 (D.S.C.), aff'd 429 F.2d 984 (4th Cir.).

V

In his motion of April 13, 1976, Diamond moved for relief under 60(b)(4) from a void judgment. A judgment is void under 60(b)(4) "only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." 11 Wright and Miller, *Federal Practice and Procedure: Civil*, at 198–200 (footnotes omitted). Apparently, there is no time limit for presenting such a motion if the court lacks jurisdiction. *Misco Leasing, Inc.* v. *Vaughn*, 450 F.2d 257 (10th Cir.).

Diamond claims that this Court was without jurisdiction because the United States in 1802 ceded to the State of Georgia all lands within the boundaries of the State. He contends that under 43 U.S.C. § 1311 the cession of lands to Georgia divests the United States of any jurisdiction over his property. The Submerged Lands Act provides that title to and ownership of lands beneath navigable waters within each state is in

the state. 43 U.S.C. § 1311(a).[7] Diamond claims that the prior judgment is void because the Rivers and Harbors Act, 33 U.S.C. § 403, conflicts with the 1802 cession and that the exercise of federal jurisdiction in this case is "ex post facto."

That argument has been made before without success. "Congress clearly has the power under the Commerce Clause to regulate the use of Landholders' submerged riparian property for conservation purposes and has not given up this power in the Submerged Lands Act." *Zabel* v. *Tabb*, 430 F.2d 199, 206 (5th Cir.), cert. den. 401 U.S. 910.

VI

Mr. Diamond urges four reasons for setting aside the judgment under 60(b)(6), that is, "any other reason justifying relief."

A. First, he says that *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 "established that Riparian Rights supercede the Federal Agency Rule that Federal Jurisdiction extends to the Mean High Water Line, within the boundaries of the State of Georgia. [Diamond] has Riparian Rights to low water mark under Georgia statutes." In *Corvallis*, the highest Court held that ownership of riverbeds within a state should be determined by state, rather than federal, law.

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[7] The United States specifically retained the right to control those lands and waters for navigation, flood control, and power production. 43 U.S.C. § 1311(d). Moreover, it retained its "powers of regulation . . . for the constitutional purposes of commerce. . . ." 43 U.S.C. § 1314.

That decision avails Mr. Diamond nought. The issue here is not the ownership of submerged lands. It is whether the Corps has jurisdiction to regulate the use of such land. That the Corps does have such power has already been established. *Zabel* v. *Tabb, supra.* Richardson Creek has been found to be, and is, navigable within the meaning of 33 U.S.C. §§ 403, 407; and Diamond's property is below the mean high water mark. *United States* v. *Diamond*, 512 F.2d 157, cert. den. 423 U.S. 928.

B. Secondly, Mr. Diamond argues that his property is less than ten acres and as such is exempt from Corps regulations. 16 U.S.C. § 662(h). It is not apposite. That section states that "[t]he provisions of sections 661 to 666c of this title shall not be applicable to those projects for the impoundment of water where the maximum surface area of such impoundments is less than ten acres. . . ." Mr. Diamond misconstrues the exception. The Act "requires that any federal agency granting a permit for license to modify any stream or body of water shall first consult with the United States Fish and Wildlife Service, Department of the Interior and also with the head of the agency exercising administration over the wildlife resources of the particular state. . . ." *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, 606 (3rd Cir.), cert. den. 420 U.S. 927. See also *Zabel* v. *Tabb, supra*, 430 F.2d at 206. Such consultation is not required if the impoundment is less than ten acres. The exemption does not restrict the jurisdiction of the Corps.

C. Diamond's third basis for setting aside the judgment under Rule 60(b)(6) is that the complaint filed by

the United States was void. Although his argument is not clear, he alleges two reasons which he contends voided the complaint.

First, he argues that an affidavit used in support of the temporary restraining order was void. Dr. Frederick Marland from the Georgia Department of Natural Resources signed the affidavit that is required in support of a temporary restraining order. F.R.Civ.P. 65(b). Mr. Diamond contends that Dr. Marland was not authorized to sign such an affidavit.[8] How such a contention would void the complaint in Suit One is beyond me.

In his affidavit, Dr. Marland stated that he observed two truck loads of fill material being dumped on Diamond's property; that he saw Diamond push this material into the marsh with a bulldozer, and that, in his judgment, such filling would cause irreparable harm to the marshlands.[9] To support a temporary restraining order, "the evidentiary quality of the affidavit must be sufficient to convince a court that there is immediate and great danger of irreparable injury. . . ." 11 Wright & Miller, *Federal Practice and Procedure: Civil* at 515. Dr. Marland's affidavit met that standard.

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[8] Mr. Diamond has confused what he perceives to be the power to arrest with the right to submit an affidavit. He points out that in *Howell* v. *State*, 238 Ga. 95, the Georgia Supreme Court held unconstitutional a statute that made a violation of the regulations of the Department of Natural Resources a misdemeanor. However, Dr. Marland is not thereby prohibited from submitting affidavits in support of the civil action.

[9] See in this connection, *Diamond* v. *Marland*, 395 F. Supp. 432 (S.D., Ga.).

Secondly, Diamond contends that the complaint was void because no official designated by 33 U.S.C. § 413 had requested the United States Attorney to initiate such an action.[10] He made this same argument on his appeal in Suit One. The Fifth Circuit responded that "the United States Attorney's duty to prevent violations of the law justifies his taking action against illegal fill operations regardless of who brings the violation to his attention." *United States* v. *Diamond, supra*, 512 F.2d at 159.

D. Finally, Diamond seeks to set aside the judgment on the grounds that the United States and the State of Georgia are guilty of malicious abuse of process and of placing him in double jeopardy. This contention is based on the fact that he was found not guilty in Chatham County Superior Court on the criminal charge of illegal fill activity. He asserts that the United States by initiating the civil action in Suit One and the State of Georgia by intervening in Suit One have placed him in double jeopardy and have abused the judicial process.

Again, Mr. Diamond misconceives the law. He fails to recognize that liability in a civil case may be based on a lesser standard of proof than that required for a criminal conviction. Acquittal of criminal charges would not preclude the State from seeking civil remedies. See *Lewis* v. *Frick*, 233 U.S. 291; *United States* v. *Burch*, 294 F.2d 1 (5th Cir.). Even if Suit One were

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[10] Section 413 provides that "it shall be the duty of United States Attorneys to vigorously prosecute all offenders . . . whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated. . . ."

a criminal case, no bar of double jeopardy arising from his acquittal of State criminal charges could be raised against the United States. The Constitution does not prohibit dual prosecutions by dual sovereigns. *United States* v. *Corbo*, 555 F.2d 1279 (5th Cir.). Mr. Diamond raised this issue in *Diamond* v. *Marland*, 395 F. Supp. 432 (S.D., Ga.). It was decided adversely to him and he cannot now relitigate it.

The other points argued in his briefs and letters to this Court are equally devoid of merit.

**MOTION TO SET ASIDE ORDER CONSOLIDATING SUITS ONE AND TWO**

On June 30, 1977, eighteen months after this Court ordered Suits One and Two to be consolidated, Mr. Diamond moved to set aside the consolidation. He argues that, because of the posture of the two cases, the consolidation will prevent his receiving a fair and impartial trial in Suit Two. His precise position is not at all clear.[11]

Rule 42(a) provides that the district court may consolidate all actions "involving a common question of law or fact." In Suits One and Two, the parties are the same, and the actions arise from the same set of facts, Diamond's illegal fill activity. The operative facts have previously been before this Court. The two cases overlap because a wrongful denial of the after-the-fact permit in Suit Two could vitiate the prior judgment of this Court in Suit One.

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[11] Both actions are before this Court, not before a jury. I fail to see how consolidation could prejudice the parties.

"A trial court has broad discretion in determining whether to consolidate a case pending before it." *National Association for the Advancement of Colored People of Louisiana* v. *Michot*, 480 F.2d 547 (5th Cir.). Further, they possess inherent power to manage their dockets expeditiously. See *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Cir.).

In any event, the ruling by this Court on the motions in Suit One moots the motion to set aside the consolidation of the two lawsuits.

**ORDER**

Diamond's various motions pending in Civil Action No. 3092 and CV475-211 are overruled and judgment will issue accordingly.

This August 2nd, 1978.

/s/ ALEXANDER A. LAWRENCE

*Judge, United States District Court*
*Southern District of Georgia*

# APPENDIX B

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION**

Civil Action No. 3092
Civil Action No. 475–221

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

HERMAN DIAMOND, DEFENDANT

HERMAN DIAMOND, PLAINTIFF

*v.*

UNITED STATES OF AMERICA AND UNITED STATES ARMY CORPS OF ENGINEERS, SAVANNAH DISTRICT, DEFENDANTS

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*ORDER AND OPINION IN HERMAN DIAMOND VS. UNITED STATES OF AMERICA AND UNITED STATES ARMY CORPS OF ENGINEERS (CV475–221)*

I have this day entered an Order denying the pending motions of Herman Diamond in these consolidated cases. The material facts were dealt with at some length. The issues involved in this case concern only the second suit, *Diamond* v. *United States*, CV475–221.

A short conspectus of that litigation will be helpful. On June 14, 1973, Mr. Diamond applied for an after-

the-fact permit for filling of a marsh area on Richardson Creek in Chatham County, Georgia. The District Engineer denied the application on March 26, 1974. The applicant then filed suit under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* Essentially, plaintiff alleges that the denial of the after-the-fact permit was arbitrary and capricious.

An evidentiary hearing was held in this Court on April 17, 1976. Subsequent hearings have been had. Both sides have filed briefs.

I

Before addressing the merits, I take up one matter. On April 13, 1976, Mr. Diamond filed, without leave of court, an amendment to his complaint. It adds five new numbered paragraphs and a prayer for relief. The amendment specifies wherein the District Engineer erred in denying the requested permit. It alleges that the Government has unlawfully confiscated plaintiff's property for which compensatory damages of $100,000 are sought.

The Government has moved to strike paragraph 7 of the amendment. It asserts

> "That by reason of the aforesaid facts and acts of the defendants, and the premises herein, the aforesaid property of the plaintiff has been unlawfully confiscated by defendants, thereby denying plaintiff the use of said property and causing plaintiff unnecessary expense, all to the damage of the plaintiff in the amount of One Hundred Thousand ($100,000.00) Dollars. . . ."

The Government contends that Diamond has not complied with Rule 15(a). The amendment was not

filed until nearly five months after the filing of defendant's answer to the original complaint. As stated, no leave to amend was sought or obtained. Such permission "shall be freely given when justice so requires." Rule 15(a). See *Foman* v. *Davis*, 371 U.S. 178. "But if a complaint or an answer, as amended, would be subject to a motion to dismiss under Rule 12(b)(6) or a motion to strike under Rule 12(f), as the case may be, it would be an idle move for the court to allow such an amendment over the objection of the opposing party. . . ." 3 *Moore's Federal Practice*, ¶ 15.08[4] at 904.

Upon timely motion, "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Rule 12(f). However, "motions to strike are viewed with disfavor by the courts." *Great Northern Paper Company* v. *Babcock & Wilcox Company*, 46 F.R.D. 67, 69 (N.D., Ga.). "Therefore, such motions will not be granted unless the allegations are so immaterial that they can have no possible bearing on the issues at trial and unless their presence unduly prejudices the opposing party. . . ." *United States* v. *Southern Motor Carriers Rate Conference*, 439 F. Supp. 29, 39 (N.D., Ga.).

Rule 12(f), according to 5 Wright & Miller, *Federal Practice and Procedure: Civil* at p. 782, "is neither an authorized nor a proper way to procure the dismissal of all or a part of a complaint. . . ." The Government's motion to strike is in the nature of one for dismissal or

partial summary judgment. "[W]hen there is no showing of prejudicial harm to the moving party, the courts generally are not willing to determine disputed and substantial questions of law upon a motion to strike. Under such circumstances, the court may properly, and we think should, defer action on the motion and leave the sufficiency of the allegations for determination on the merits." *Augustus* v. *Board of Public Instruction of Escambia County, Florida*, 306 F.2d 862, 868 (5th Cir.).

The Government's motion to strike the amendment is denied and same is permitted to be filed.

II

Although the Secretary of the Army has wide discretion in granting or denying after-the-fact permits, his decision may be reviewed in the district court. 5 U.S.C. § 706. See *Zabel* v. *Tabb*, 430 F.2d 199 (5th Cir.), cert. den. 401 U.S. 910. However, the court "may not substitute its judgment for that of the Secretary." *Di Vosta Rentals, Inc.* v. *Lee*, 488 F.2d 674, 678 (5th Cir.), cert. den. 416 U.S. 984.

In his original complaint, Mr. Diamond complained of the Secretary's decision on four grounds. He tracked the language of 5 U.S.C. § 706(2)(A), (B), (C), and (D).[1] The standard of review in such cases is whether "there was a rational basis for the denial of

[1] To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the

the permit." *Joseph G. Moretti, Inc., v. Hoffman*, 526 F.2d 1311 (5th Cir.).[2]

At the hearing on April 17, 1976, Colonel Edwin C. Keiser, then the District Engineer of the Corps of Engineers at Savannah, explained his reasons for denying the permit. In reaching his decision, Colonel Keiser relied on 33 C.F.R. § 209.120. (Gov't. Ex. A). That regulation provides that "The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. . . . All factors which may be relevant to the proposal must be considered . . . . No permit will be granted unless its issuance is found to be in the public interest."[3]

Colonel Keiser gave the following explanation for denying the after-the-fact permit sought by Diamond:

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meaning or applicability of the terms of an agency action. The reviewing court shall—. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law.

[2]The substantial evidence test under 5 U.S.C. § 706(2)(E) is not applicable. See *Camp* v. *Pitts*, 411 U.S. 138.

[3]These proposed regulations were effective on May 4, 1973. Mr. Diamond's application was filed on June 14, 1973 while the proposed regulations were still in effect. The applicable provisions are the same as those currently in effect. See 33 C.F.R. § 209.120(f).

"Well, basically, in evaluating the public interest aspect it did not appear that this would be in the public interest, that it was not the best alternative use of the land. It disrupted the food chains, had an adverse effect on fisheries, as well as on wildlife in the area, had water quality implications, a change in land use from marsh land the productive use in that regard—as I say, I considered alternatives, and there seemed to be other feasible alternatives that would not destroy the marsh to have access to the water for boating. I considered the views of the other agencies and particularly in areas in which they have cognizance in reaching my decision as well, and their obligation to the fact that this fill had been placed below mean high water without prior authorization."

Tr. pp. 9–10.

The District Engineer relied on responses to a public notice which he had issued on October 2, 1973. (Gov't. Ex. 2). Both the Department of the Interior and the Environmental Protection Agency recommended denial of the permit. The responding State agencies felt that application should be first made to them. The Ogeechee Audubon Society objected to the fill. Colonel Keiser relied on a 1932 Corps report to determine navigability of the area involved. (Tr. p. 15). He also considered a topographic map prepared from a supplementary survey. (Tr. p. 18).[4] He verified the

[4] Much ado has been made concerning the fact that the overlay introduced at the hearing does not precisely correspond to the topographic survey. Colonel Keiser explained that when he made his determination he used large scale photographs rather than the reductions that were introduced. (Tr. p. 23).

information by a site survey. (Tr. p. 24). The District Engineer concluded that the fill would result in minor effects on navigation and that it had "decreased productivity in deeper water areas of the estuarine. The fill work has also eliminated habitat nesting, feeding and wading areas for a number of birds and animals." (Gov't Ex. 2, pp. 4-5). Colonel Keiser found "on balance, that the public interest is best served by denial of the permit application and removal of the fill to the historic mean high water line." (Gov't. Ex. 2, p. 6).

This Court finds that there was a rational basis for his conclusions and ruling.

> "It was consistent with the applicable regulations, 33 C.F.R. § 209.120, and with the three major pieces of legislation which set policy in this area, the National Environmental Policy Act of 1969, 42 U.S.C. § 4331-4347, the Fish and Wildlife Coordination Act of 1934, 16 U.S.C. § 771-666c, and the Rivers and Harbors Appropriation Act of 1899. The Corps properly considered environmental factors in making its decision. Zabel v. Tabb, *supra*. It properly consulted other agencies in making its decision. United States v. Moretti, 5th Cir. 1973, 478 F.2d 418. See also Bankers Life and Casualty Company v. Village of North Palm Beach, 469 F.2d 994 (5 Cir. 1972)."
>
> *DiVosta Rentals, Inc.* v. *Lee, supra* 488 F.2d at 681.

III

A few words concerning Diamond's amendments are proper at this point.

First, he contends that the District Engineer was not authorized to deny the permit. This is ill founded.

Section 209.120(i) authorizes such action by the District Engineer. Under 33 C.F.R. § 209.120(p)(1), the district engineer may deny a permit "when a State has objected to a required certification of compliance with its coastal zone management program."

Secondly, Diamond claims that a permit is not required for fill prior to December 18, 1968. Colonel Keiser testified that the fill placed prior to that time would not have to be removed. (Tr. pp. 13–14).

Thirdly, Mr. Diamond contends that there has been an unlawful taking of his property and that he has sustained damage as a result. The Administrative Procedure Act does not constitute a waiver of sovereign immunity as to suits for money damages. *Warner* v. *Cox*, 487 F.2d 1301 (5th Cir.). The Act itself states that it is restricted to cases "seeking relief other than money damages." 5 U.S.C. § 702.

**ORDER**

The decision of defendants denying plaintiff's application for an after-the-fact permit is affirmed. Judgment in CV475–221 will be entered in favor of the defendants.

This August 2nd, 1978.

/S/ ALEXANDER A. LAWRENCE

Judge, United States District Court
Southern District of Georgia

# APPENDIX C

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION**

Civil Action No. 479-159

HERMAN DIAMOND, PLAINTIFF

*v.*

Honorable, Judge,

ALEXANDER A. LAWRENCE, DEFENDANT.

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*ORDER DENYING PLAINTIFF'S MOTION TO RECUSE*

On May 7, 1979, Mr. Diamond filed a "Complaint and Injunction," styled Herman Diamond vs. Honorable Judge, Alexander A. Lawrence, CV479-159. He seeks to disqualify me from presiding in the case of Diamond vs. Marland, CV477-80 on the basis of my alleged personal bias against him.

A hearing in the latter case is scheduled for May 10, 1979, on the motions for summary judgment by the defendants. Notice was mailed to the parties on April 26, 1979. Since that time, Mr. Diamond's counsel has withdrawn from the case.

The action is instituted pursuant to 42 U.S.C. §§ 1983, 1985(3) alleging violation of plaintiff's civil rights. Jurisdiction is predicated on 28 U.S.C. § 1343(4). Mr. Diamond asks that an injunction issue and that the May 10th hearing be vacated.

The complaint in 479-159 alleges that, in two prior actions involving Mr. Diamond, I have ruled contrary to the Georgia Cession of 1802 and have unlawfully confiscated his property.[1] An injunction is not the proper means to seek recusal of a judge. Under the statute, the proper method is by filing an affidavit of bias. 28 U.S.C. § 144. Herman Diamond's complaint will be deemed to be a renewal of the motion for disqualification previously filed in 477-80.[2]

Attached to Diamond's complaint in 479-159 is a copy of the "Verified Application to Disqualify Judge" which Mr. Diamond filed in 477-80. The former motion for recusal was based only on 28 U.S.C. § 144.[3] However, it will likewise be considered as filed pursuant to 28 U.S.C. § 455.[4]

Mr. Diamond apparently relies on the language in § 144 that, upon the filing of an affidavit of prejudice

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[1] See *United States* v. *Diamond*, 512 F.2d 157 (5th Cir.), cert. den. 423 U.S. 928; *Diamond* v. *Marland*, 395 F. Supp. 432 (S.D., Ga.).

[2] As I recall, I indicated orally that I was denying the motion to recuse myself in 477-80 at a hearing held in CV3092 and CV477-221. In a letter to this Court dated September 27, 1977, Ralph Snow, Diamond's former counsel, indicated that Diamond no longer wished to appeal denial of the application for disqualification. He added, "Mr. Diamond also asked me to express his appreciation to the Court staff and to your Honor personally for the cooperative attitude expressed to him recently . . ."

[3] "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

[4] "(a) Any justice, judge, magistrate, or referee in bankruptcy

against a judge, "such judge shall proceed no further therein . . ." However, "[t]he mere filing of an affidavit of bias pursuant to 28 U.S.C. § 144 does not require a trial judge to disqualify himself from a particular case." *United States* v. *Dansker*, 537 F.2d 40, 53 (3rd Cir.), cert. den. 429 U.S. 1038. "It is only after the judge against whom it is directed examines the affidavit and finds it to be timely and sufficient that his disqualification is made mandatory." *United States* v. *Partin*, 312 F. Supp. 1355, 1359 (E.D., La.).

"Once the motion is filed under § 144, the judge must pass on the legal sufficiency of the affidavit, but may not pass on the truth of the matters alleged." *Davis* v. *Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1051 (5th Cir.), cert. den. 425 U.S. 944. "The legal sufficiency of the affidavit is determined by ascertaining whether it contains facts which would 'convince a reasonable man that a bias exists.' It is clear, however, that the facts alleged in the affidavit must show that the judge's bias is personal, as opposed to judicial, in nature." *United States* v. *Archbold-Newman*, 554 F.2d 665, 682 (5th Cir.), cert. den. 434 U.S. 1000.

The first seven "facts" in Diamond's application and the only ground alleged in 479-159 are that I have presided in prior cases involving him and related mat-

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of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . ."

ters and have ruled against him. "The § 455 determination, like the § 144 determination, should rest upon extrajudicial rather than judicial conduct. [Cit.] Appellant's grievance against members of this court concerns only judicial conduct: he complains of prior rulings by the court. Such allegations are insufficient grounds for disqualification." *Hepperle* v. *Johnston*, 590 F.2d 609, 614 (5th Cir.). See *Duplan Corporation* v. *Deering Milliken, Inc.*, 400 F. Supp. 497 (D.S.C.).

The other claim of personal bias is unsupported and is insufficient in law. *Parrish* v. *Board of Commissioners of the Alabama State Bar*, 524 F.2d 98, 101 (5th Cir.), cert. den. 425 U.S. 944.

The affidavit in 477–80 and the complaint filed in 479–159, construed together or separately, are legally insufficient to require disqualification. The motion for recusal is denied.

The foregoing is deemed a sufficient answer to the complaint filed in CV479–159. The Clerk will file a copy of this Order in CV479–159 and in CV477–80.

The motions for summary judgment in Diamond vs. Marland will be heard as scheduled at 9:00 a.m. on May 10, 1979, in the third floor courtroom of the Federal Building, Savannah, Georgia.

This May 9th, 1979.

/s/ ALEXANDER A. LAWRENCE

Senior Judge, United States District Court
Southern District of Georgia

# APPENDIX D

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION**

HERMAN DIAMOND, PLAINTIFF

*v.*

DR. FREDERICK C. MARLAND, Department of Natural Resources, State of Georgia; COLONEL EDWIN C. KEISER, District Engineer; COLONEL FRANK WALTER, District Engineer; STEVEN OSVALD, Permit Section, Engineers; WILLIAM L. YOUNG, Engineer; EDWARD MYATT, Engineer; GLENN F. MACAULEY, of the United States Corps of Engineers, Savannah, Georgia, District, DEFENDANTS

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**ORDER ON MOTIONS OF THE DEFENDANTS FOR SUMMARY JUDGMENT**

I.

This is a civil rights action brought by Herman Diamond under 42 U.S.C. §§ 1983 and 1985(3)[1] and for

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[1] 42 U.S.C. § 1983. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. § 1985 (3). "If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either di-

alleged violation of his rights under the Fifth, Fourteenth and other Amendments to the federal Constitution. Before this Court are motions for summary judgments by Dr. Marland, Director of Marshland Protection of the Georgia Department of Natural Resources, and the Federal Defendants, Colonel Edwin Keiser and Colonel Frank Walter, District Engineers of the Army Corps of Engineers; Civil Engineers William Young and Glenn Macauley, and Steven Osvald, Director of Permits; and Edward Myatt, engineer.[2]

The complaint alleges that Marland unlawfully verified complaints against Diamond in prior actions by the State of Georgia and by the United States under their respective marshland protection statutes and Regulations. It is claimed that he conspired[3] with other defendants to deprive plaintiff of his civil rights in the suit by the United States for injunctive relief against filling marshland and also deprivation of his rights under the Federal Constitution.

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rectly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

[2]John Glenn Herndon, also of the Corps of Engineers, was originally named as one of the defendants. He was striken as a party by order of this Court dated May 16, 1979.

[3]A civil conspiracy is not actionable *per se*. The gist of the cause of action is not the conspiracy or combination, it is the tort perpretated upon the plaintiff with resultant damage. *Johnson v. Ellington*, 196 Ga. 846; *Cook v. Robinson*, 216 Ga. 328.

In the suit now before this Court, it is alleged that Dr. Marland caused the unlawful arrest of plaintiff under color of the Georgia Coastal Marshlands Protection Act of 1970. It is claimed that Engineers Keiser and Walter presented false and misleading affidavits in obtaining the injunction under the 1974 deicsion of this Court. Civil Engineers Young and Macauley are alleged to have knowingly given false testimony in that litigation. It is further claimed that Young testified falsely as to tide levels on plaintiff's property and that Macauley wrongly interpreted aerial photos of the Diamond property introduced at the trial by the Corps of Engineers.

The Government contends in its motion for summary judgment that Diamond is seeking to reargue and relitigate matters and issues already decided by this Court against him and affirmed by the Fifth Circuit Court of Appeals. It is argued that the principles of *res judicata* and collateral estoppel apply.

Counsel for Marland makes a like contention to the Government's in connection with his motion for summary judgment.

## II.

### *Antecedents of Present Litigation*

Diamond is a chronic litigator. The antecedents of the present litigation include the following actions previously brought against or by him in connection with this controversy.

1. State v. Diamond in the State Court of Chatham County in 1974 for filling marshland without a State permit. Diamond was acquitted after a jury trial.

2. United States v. Diamond (S.D., Ga., Civil Action No. 3092, 1974). Suit for injucntive relief by Government for unauthorized filling of marshland contrary to federal law and regulations. Decision rendered against Diamond. The grant of injunctive relief by this Court was affirmed on appeal. See *United States* v. *Diamond*, 512 F.2d 157 (1975), *cert. den.* 423 U.S. 928.

3. *Diamond* v. *Marland, et. al.*, Civil Rights action brought in 1974 by Diamond in this Court against Dr. Marland, two Chatham County police officers, two State Rangers and the Commissioners of Chatham County. That action was based on his arrest without a warrant and the resulting prosecution in the State Court of Chatham County. The decisions by this Court against Diamond growing out of the warrantless arrest are reported in *Diamond v. Coleman, et. al.*, 395 F. Supp. 429 (1975). No appeal was taken from this ruling.

4. In Diamond v. United States (S.D., Ga., CV 475–221) plaintiff sued for damages as a result of the denial by the Corps of Engineers of Diamond's request for an after-the-fact permit for filling marshland. The suit was consolidated with that in *United States* v. *Diamond* (CA 3092) and, following an evidentiary hearing, was decided against him on August 2, 1978. The denial of an after-the-fact permit was appealed to the Court of Appeals and is currently pending there.[4]

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[4] Also pending before the Court of Appeals is an appeal from an order dated August 2, 1978, denying Diamond's motion under F.R. Civ. P. Rule 60(b) for relief from the injunction obtained by the Government in *United States* v. *Diamond* in 1974.

5. Motion to recuse on ground of prior unfavorable rulings. See *Diamond* v. *Judge Lawrence* (CV 479–159, 5/9/79). Dismissed.

III.

Arguments were heard on May 10, 1979, from 9:00 A.M. to 11:30 A.M. Diamond argues his own case for an hour and a half. Counsel for the Federal Defendants contended that the issues raised in this suit were adjudicated in earlier litigation between the parties. In its motion for summary judgment the attorneys for Dr. Marland argue that he was a defendant in the earlier case of *Diamond* v. *Marland et. al.* (CV 474–40) in which summary judgment was granted to the defendants. The present action, his counsel insists, involves the same issues of law and fact previously presented.

Counsel for the Federal Defendants argue that United States v. Herman Diamond (No. 3092) decided the present action adversely to him. (Federal Defendants' brief at 4–5). It is further contended that their actions are clothed either with absolute or qualified governmental immunity. See *Butz* v. *Economou*, 438 U.S. 478.

What Diamond is trying to do is relitigate issues previously determined against him. His argument at the hearing on May 10th last was reported but was not transcribed. My impression is that he raised anew all issues decided against him in previous cases. The reporter replayed the tape and made some notes. Along with much irrelevant argument, Diamond contended that defendants conspired to deprive him of the use of

his property which was effectuated by officials of the Corps of Engineers furnishing false and misleading affidavits and giving false testimony at the trial of the 1974 case. Plaintiff requested that he be allowed to plead this to a jury.

It is clear that Diamond is riding the same old nag with a different saddle.

IV.

As the present complaint is drawn, 28 U.S.C. §§ 1983 and 1985(3) is extended to all of the defendants. Those sections provide a remedy in the federal courts only in the case of State action and not against officers and agents of the federal government acting under color of federal law. See *Bethea* v. *Reid*, 445 F.2d 1163 (3rd Cir.), *cert. den.* 404 U.S. 1061; *Robinson* v. *Wichita Falls & North Texas Community Action Corporation*, 507 F.2d 245 (5th Cir.). The remedy for conspiracy provided in 1985(3) embraces only State action and does so only where there is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin, et. al.* v. *Breckenridge, et. al.*, 403 U.S. 88, 102. That element does not appear here.

The only claim of Diamond remaining is his contention that the defendants violated his rights under the federal Constitution. In *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 383, the Supreme Court held that a district court's jurisdiction under 28 U.S.C. § 1331 extended to civil damage actions alleging a violation of the Fourth Amendment. More recently, the Supreme

Court has held that that same jurisdictional basis applied to civil damage actions alleging violation of equal protection under the Fifth Amendment. *Davis* v. *Passman*, ___ U.S. ___ (47 L.W. 4643). Under those decisions, this Court has jurisdiction over Diamond's claims pursuant to § 1331.[5]

Except in the broadest sense, one cannot find in the record that the Corps of Engineers and its officials acted contrary to lawful authority or in derogation of the federal Constitution.[6] However, this case is before me on motion for summary judgment and I do not base my decision on that point in the light (or better, the crepuscule) of *Bivens* and *Passman*. As to both Marland and the Federal Defendants, I find firmer ground in relying on the doctrine of *res judicata* and collateral estoppel.

V.

Counsel for all the defendants contend that the issues raised by Diamond's present complaint are barred

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[5] The case of *Butz* v. *Economou*, *supra*, involved a suit against the Secretary of Agriculture, the Chief Hearing Examiner and other officers of the Department. The Government contended that the defendants possessed absolute immunity from a suit for damages. However, the Supreme Court in a 5 to 4 decision held that the defendants possessed a qualified immunity, that is, in the case of actions taken in good faith, rather than absolute immunity.

[6] The most that can be said is Diamond's insistence that in the trial before this Court in 1974 officials of the Corps of Engineers lied. In libel and slander cases relevant affidavits and testimony of witnesses at a trial are absolutely privileged under Georgia law and federal common law. See Ga. Code Ann. §105-709; *Dennis* v. *Adcock*, 138 Ga. App. 425; *Fedderwitz* v. *Lamb*, 195 Ga. 691; *Expedition Unlimited Aquatic Enterprises, Inc.* v.

by the principles of collateral estoppel. Under that doctrine, the relitigating of issues of fact decided in earlier cases involving the same parties is not permitted. The purpose is to prevent the needless repetition of litigation between parties when they have had a fair opportunity to press their claims. A party to prior litigation is collaterally estopped from raising any claims or defenses that could have been raised therein. *Aerojet-General Corporation* v. *Askew*, 511 F.2d 710 (5th Cir.), *cert. den.* 423 U.S. 908. "While res judicata bars relitigation of the same cause of action, collateral estoppel bars relitigation of the same facts or issues that were necessarily determined in the prior proceeding." *Carr* v. *United States*, 507 F.2d 191, n. 5 (5th Cir.), *cert. den.* 422 U.S. 1043. See also *United States ex rel. Harshman* v. *County Court of Knox County*, 122 U.S. 306, 318.

Diamond's claim that Dr. Marland unlawfully procured his arrest was raised and previously decided. In *Diamond* v. *Marland, et. al.*, 395 F. Supp. 432, plaintiff brought a civil rights action against him and others alleging that "Marland caused the four defendant law enforcement officers to unlawfully arrest and detain plaintiff." Diamond also claimed that his actions violated his Constitutional rights under the Fourth, Fifth, and Fourteenth Amendments. This Court granted Marland's motion for summary judgment on the ground that there was probable cause for the arrest.

Plaintiff claims in the action now before me that Dr. Marland conspired with the federal defendants to deny

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*Smithosonian Institution, et. al.* 566 F.2d 289 (C.A.D.C.); *Brown* v. *Collins*, 402 F.2d at 212-213 (C.A.D.C.).

him due process in the trial in 1974 in the case of *United States* v. *Diamond,* CA No. 3092. Presumably Mr. Diamond is of the opinion that Dr. Marland perjured himself in testifying in that case. In any event, it is clear that at the evidentiary hearing therein he could have sought to establish such a claim. Similarly, the allegation that the Federal Defendants conspired to deprive him of his rights by perjuring themselves during the trial of *United States* v. *Diamond* (CA No. 3092) raises the issue of the conclusiveness of the findings based on their testimony. Full opportunity existed for plaintiff to explore that possibility at the trial of the action for injunctive relief.

The only difference between the present action and what was decided adversely to Diamond in the past is the claim by him that there was a *conspiracy* by all of the defendants herein to perjure themselves by giving false testimony as witnesses in the prior suits in this Court. The mere branding thereof as a "conspiracy" does not change the substance of things. The testimony of the defendants, whether right or wrong, was the basis of the adverse decisions. It is a matter of law, conclusive and preclusive of relitigation on the theory of a conspiracy. Nor does the fact that the Federal Defendants here were not actual parties to *United States* v. *Diamond, supra,* (CA No. 3092) affect at all the conclusiveness of the findings against Diamond based on their testimony. "Under the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely alligned with his interests as to be his virtual representative." *Aerojet-General Corporation* v. *Askew, supra,* at 719.

Diamond had a full and fair opportunity at the hearing on the injunction to raise the issue of the witnesses of the Corps of Engineers giving false testimony. As stated above, collateral estoppel applies not only to defenses that were expressly raised but to those that could have been raised in a former action. See *Aerojet-General Corporation* v. *Askew, supra.* That aside, the determination of the question of falsity of testimony is implicit in the findings of this Court that the Government witnesses in the prior hearing were not lying, but in fact were telling the truth. Wherein is there any difference, save in terminology, in Diamond arguing then that the witnesses gave false testimony and in now claiming that they agreed among themselves to do so? For the foregoing reasons defendants' motions for summary judgment must be granted and the conspiracy action dismissed. Judgment to that effect will be entered.

This July 20th, 1979.

/S/ ALEXANDER A. LAWRENCE

SENIOR JUDGE, UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

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Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

NO. 80 - 190

# In the Supreme Court of the United States

October Term, 1980

HERMAN DIAMOND, Petitioner,

v.

UNITED STATES OF AMERICA AND ET AL. Respondent,

v.

UNITED STATES OF AMERICA and

UNITED STATES ARMY CORPS OF ENGINEERS, Savannah, Ga., Respondent,

v.

Dr. FREDRICK C. MARLAND, State of Georgia, ET AL, Respondent.

## REPLY BRIEF FOR PETITIONER

HERMAN DIAMOND, pro se
3610 Macceo Dr.
Savannah, Ga. 31410
(912) 897-2442

No. 80-190

In the Supreme Court of the United States

OCTOBER TERM, 1980

HERMAN DIAMOND, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# REPLY BRIEF FOR PETITIONER

HERMAN DIAMOND, pro se
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In the Supreme Court of the United States
October Term, 1980

No. 80-190

HERMAN DIAMOND, Petitioner

v.

United States of America,ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# REPLY BRIEF FOR PETITIONER

1. The respondents brief,refers to Petitioner's lands as being marshland,is an erronious conclusion of facts..

The high ground of petitioner was proven to be all high ground and the marshland in question was eastward on Mr. Barrets property who was granted a permit by the U.S.Engineers.(T.p.31,5/28/73).and in CA 477-80 (T.p.70-77,5/10/79). Petitioners EXhibits,test borings show the property as being above the required elevatio-for jurisdiction, (Pl Ex # 3, 8/24/77) and (Pl Ex #6 & 18) geoligist reports. clearly testified that the elevations were above 8 ft or more before fill to 11 ft. A more accurate survey is (pl Ex # 28,1/3/78) the permit showing the whole area. The area of jurisdiction by the National

Oceanic and Atmospheric map of the Richardson Creek as being, 7.1 feet at Mean High Tide.

The Complaint CA 3092 vacated upon consolidation, in December 4,1975(PB.8a, 9a) is without authority of Congress. Title 33 U.S.C.§ 406,(1a) that enforcement for violation of 33 U.S.C.§ 403, must be instituted under the direction of the Attorney General of the United States and removal of the obstruction by injunction.

The complaint CA 3092 (4a-7a) was initiated by the local U.S.Asst. Attorney Mr. Lamar Walter for an injunction without having any charges brought against Petitioner Diamond for misdemeanor charges nor was he ever granted a jury trial.

Consolidation requires a new Judgment Ramswick v. Messner, 200 Minn 299, 274 N.W.179 .

Reines v. Philadephia Gas Works, 107 Pa. 422.

No Judgment has been issued since December 4,1975,

On June 17,1980, Petitioner filed a motion for dismissal or jury trial, and the Government Attorney's did not respond and on September 5,1980 Petioner filed a motion to dismiss and judgment for counterclaim for damages. The lower Court, has not ruled after almost 5 years.

Jurisdiction of this Complaint does not lie pursuant to 28 U.S.C.§ 1345. Therefore this Honorable Court must exercise its power of supervision, to deny the lower District Court jurisdiction over an unauthorized, illegal and in violation of

Petitioner's constitutional rights as is the 1802 Compact between the Federal Government and the State of Georgia Whereas the Complaint violates these agreements as in the June decision of the U.S. Supreme Court on the Fort Lariamie Treaty of 1877 was violated and property illegaly seized, as was Petitioners, by injunction, and thereby lies a claim for damages.

1802"Georgia Cession" (American State Papers (class VIII)- Public Lands, Document No. 69 Loerie Ed. 1834) (P.App. 1a-2a).

2. The statement that Petitioner filed an after the fact permit for further fill is a false statement of facts, (Pl.Ex # 12, 1/3/78) a letter from the U.S.District Engineer, clealy indicates that the permit was for a bulkhead and a very small area of fill,(Pl.Ex # 28,1/3/78) is the aplicATION FOR A PERMIT, and no mention was made that the permit was an after the fact, and the denial of a permit is not a violation of 33 U.S.C. § 403, U.S. v. Kane, 602 F. 2d 490-494

Rule 60 (b) was timely filed as to jurisdiction and fraud, only three months after consolidation and where no judgment has ever been issued in CA 3092 since consolidation the vacated judgment is moot.

The denial of the permit in CV 475-221 was judicial error, as the District Engineer never signed the letter of denial, (Gt Ex # 3,4/17/76) letter to

Petitioner, must have the official signature to be legal document.

The U.S.District Engineer also stated that no survey was ever taken to determine whether Petitioner's property required a permit, ( T. p.32-33,4/17/76).

The U.S.District Court in Washington, D.C. found that the U.S. Engineers had acted unlawfully and ordered the Secretary of the Army to grandfather all fill as of July 25,1975, in the Federal Register, which would cover any violation that would be charged in the complaint, CA 3092, as wetlands and marshlands are one and the same,

NRDC v. CALLAWAY, ET AL. 392 F. Supp. 686.

Therefore CV 475-221 must be dismissed.

3. The Recusal of the late Honorable Judge Alexander A. Lawrence was a valid one and with good reason, the Title 28 U.S.C.§ 144 and 28 U.S.C.§ 455, The Court did not grant a hearing to review the complaint of recusal, he ruled from the bench that he Application for disqualification was overruled, he did it once and he would do it again, (T.p.2-3,8/24/77).

28 U.S.C.§§ 144, states that a Judge can proceed no further therein, but anoth-Judge shall be assigned to hear such proceedings.

28 U.S.C.§§ 455, (a) shall disqualify himself in any proceedings in which his impartialty might be reasonably be questioned.

Therefore all Judgments issued in the above cases are without jurisdiction.

4. The original judgment of April 17, 1974, denied the Petitioner, the right to construction, to protect his property and denied him maintenance of his dock,dock-house and 40 feet of walkway to the high ground,after these many years decayed, rotted away and many areas of the property was washed away due to high tides and storms, this Judgments is in violation of Articles 4 and 5 of the U.S.Constitution, of unlawfull seizure and without due compensation. Judgment (PB 20a-21a).

The Court of Appeals Fifth Circuit, found the original Judgment faulty and made some correction since the docks and walkways were under authorized permits and in the Courts order of NRDC v. Calla-away, 392 F. Supp. 686, where no permits were required untill after July 25,1975 The complaint CA 3092 is a mere nullity.

Where witnesses testify as to public matters, there is no privileged information,as to fraud and perjury, it is for a jury to decide based on the evidence submitted.

Administrative Law:§ 127, 1 Am Jur 2

To declare what shall constitute a crime and how it shall be punished is a power vested solely and exclusively in the legislature, and it may not be deligated to any other body or agency.

The Complaint 3092 is such an instrument deligating the manner in which an assummed violation of the law requesting an injunction over Petitioner's property, not authorized by law, 33 U.S.C.§ 406 .

The U.S.District Court has refused to allow Petitioner to recall all witnesses and confront them with the evidence to support his charges of conspiracy and fraud. (T.p.1-94,5/10/79).(T.p.2-11,9/30/1977)and the courts statement that he had denied petitioner right to open hearings.

For the above stated reasons and for the violations of petitioners Constitutional Rights and denial of Due process and equal protection and for the violation of the 1802 Compact between the Federal Government and the State of Georgia, this petitioner prays that this Honorable Court will honor his request for a writ of Certiorari.

Respectfully Submitted

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# APPENDIX

## § 406. Penalty for wrongful construction of bridges, piers, etc.; removal of structures

Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States. Mar. 3, 1899, c. 425, § 12, 30 Stat. 1151; Feb. 20, 1900, c. 23, § 2, 31 Stat. 32; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167.